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1100

No. 2975

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

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COGGESHALL LAUNCH COMPANY

(a corporation),

Appellant,

VS.

ELIZA A. EARLY, claimant,

Appellee.

BRIEF FOR APPELLANT.

Filed

OCT 5 - 1917

CLARENCE COONAN,

NAT SCHMULOWITZ,

Proctors for Appellant.

F. D. Monckton,
Clerk.

Filed this day of October, 1917.

FRANK D. MONCKTON, Clerk.

By Deputy Clerk.

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TOPIC I.

Statement of the Case.

This appeal is prosecuted from a judgment of the Southern Division of the United States District Court, for the Northern District of California, First Division.

The petitioners for limitation of liability in the Court below were Coggeshall Launch Company, a corporation, and Hammond Lumber Company, a corporation. The latter is the successor in interest of the Vance Redwood Lumber Company, a corporation, which had among its assets, a contract of conditional sale with the Coggeshall Launch Company, whereby title to the steam vessel

“Antelope” was to be conveyed to the Coggeshall Launch Company upon the latter making certain payments for the same. By virtue of said contract, however, possession and control of said vessel immediately vested in the Coggeshall Launch Company and on the 15th day of January, 1915, the date on which one George D. Early, son of claimant and appellee, lost his life, said vessel was operated solely by Coggeshall Launch Company without participation of any character, by the Hammond Lumber Company or by the Vance Redwood Lumber Company. At that time and prior thereto, the “Antelope”, on its evening trip from Samoa to Eureka, transported workmen from the Hammond Lumber Company wharf to the “G” Street dock in Eureka. A large number of these men were carried on the lower of the two decks of said vessel. On the starboard side of the ship there was a cargo-port used to handle freight. This cargo-port was closed by order of the inspectors either by a sliding door or by a bar, the former being used in cold or windy weather, and the latter when the weather was pleasant. The evidence of the petitioners was that always either the bar was up or the door was closed; that sometimes the door was closed and the bar not up, and sometimes the door would be closed and the bar be up. The witnesses for the claimant, whose testimony has been followed by the District Court, was, however, that the bar had always been up before the day of the accident. The passengers on the eve-

ning trip, almost entirely employees from Hammond Lumber Company, returning daily by the "Antelope" from their work, were accustomed, at the landing of the ship, to open the said door or take down the said bar, go out upon the guard rail and clamber up the "G" Street wharf, or jump across an intervening space of water to a freight gang plank which led up to the wharf. The Coggeshall Launch Company and its predecessors, Hammond Lumber Company, had instructed the captain and crew of the "Antelope" not to permit taking down the bar or opening the door, but to have the men go ashore by the upper deck where the passenger gang plank was handled. These instructions were repeatedly given as warnings to the regular passengers, but were constantly disregarded. Considerable attempts were made to prevent such action by passengers but without correcting the same. The action of opening the door or taking down the bar usually was preceded by the blowing of the landing whistle. Captain Krohnkie, who was the master at the time, usually blew the whistle about the foot of "E" Street.

Early, on the occasion of the loss of his life, assisted two companions in opening the door, which had been closed at Samoa. The point at which this act was done, was opposite McKay's wharf, or opposite "B" Street, both of which are in the City of Eureka. Two of Early's companions, Alva Moss and Emmett Whelihan by name, commenced

the opening of the door, and Early assisted when the door stuck about a foot and one-half to two feet from the point toward which it was being opened. In completing the opening of the door the three boys pushed at the end of the door near where the bar would have been if in place. The bar, however, was not up. All the witnesses to the accident noticed this fact and it seems that the light was sufficient to appreciate the same.

After the door was opened Early evidently stepped back a step or so and went overboard. The only witness who gave a clear statement of what happened, and who was a witness for the claimant, stated that Early stepped over onto the guard rail, over the point where the bar would have been, if in place, and lost his balance. Early had opened this door at other times.

The action was commenced by petitioners filing a petition for limitation of liability. To this petition claimant has filed a claim and an answer. While the claim states affirmatively a cause of action, the answer is negative in its terms and sets up no cause of action.

TOPIC II.

Specifications of Errors.

The first group of assignments present the question whether any issues are raised by claimant's

pleadings. This group includes Assignments 17 and 18. Assignment 18 makes the point that judgment on the pleadings should have been rendered for the petitioner and reads as follows:

“18. The said District Court erred in not rendering judgment for petitioner Coggeshall Launch Company on the pleadings.”

Assignment 17 raises the question whether in the absence of sufficient pleadings any evidence adduced by claimant was competent, relevant or material and reads as follows:

“17. The said District Court erred in not sustaining the objection of proctor for petitioner Coggeshall Launch Company that all evidence introduced by claimant was incompetent, irrelevant and immaterial.”

The second group of assignments present the question whether any negligence by the Coggeshall Launch Company, resulting in the death of Early, has been proven. This group includes assignments of errors 5, 10, 11, 12, 13, 15.

In Assignment 10 the point is made that there was no negligence; that Coggeshall Launch Company was not negligent in failing to put a bar across the cargo-port door. Assignment 10 reads as follows:

“10. The said District Court erred in finding that the petitioner Coggeshall Launch Company was negligent in failing to put up a bar across a cargo-port door and thereupon rendering judgment in favor of said claimant.”

In Assignment 11, the point is made that Coggeshall Launch Company was not negligent by failing to protect and warn passengers against opening the cargo-port door. Assignment 11 reads as follows:

“11. The said District Court erred in finding that the petitioner Coggeshall Launch Company had not protected and warned passengers against opening of the cargo-port door by said passengers and thereupon rendering judgment in favor of said claimant.”

In Assignments 12 and 13 the point is made that Coggeshall Launch Company was not negligent in failing to prevent passengers from opening the cargo-port door after having knowledge of the custom of opening the door. Assignments 12 and 13 read as follows:

“12. The said District Court erred in finding that knowledge of the custom of passengers opening the cargo-port door against orders of the petitioner Coggeshall Launch Company was negligence by the said petitioner and thereupon rendering judgment in favor of said claimant.

13. The said District Court erred in finding that the death of George D. Early resulted from a failure by petitioner Coggeshall Launch Company to prevent the continuance of the custom of passengers to open the cargo-port door and thereupon rendering judgment in favor of said claimant.”

In Assignment 15 the point is made that Coggeshall Launch Company was not negligent in operating the “Antelope” with a crew one man short

and failing to place the bar across opening of cargo-port door. Assignment 15 reads as follows:

“15. The said District Court erred in finding that the death of George D. Early resulted from the negligence of the petitioner Coggeshall Launch Company in operating the steam vessel ‘Antelope’ with a crew one man short, the failure to have another member to perform the duties of said absent member of the crew and to put up the bar in the cargo-port door of the steam vessel ‘Antelope’, and to thereupon render judgment in favor of said claimant.”

The third group of assignments presents the question whether the proximate cause of decedent’s death was not the negligence of Early, of his companions or of Early and his companions. These assignments are 8 and 9 and read as follows:

“8. The said District Court erred in failing to find that the death of George D. Early resulted from the concurrent negligent act or acts of George D. Early, one Emmett Whelihan and one Alva Moss, and thereupon to enter judgment in favor of petitioner Coggeshall Launch Company.

9. The said District Court erred in failing to find that the death of George D. Early resulted from the negligent act of one Emmett Whelihan or from the negligent act of one Alva Moss or from the concurrent negligent act of one Emmett Whelihan and one Alva Moss and thereupon to enter judgment in favor of petitioner Coggeshall Launch Company.”

The fourth group of assignments presents the question of contributory negligence on the part

of the deceased. This group of assignments includes Assignments 7 and 16.

The point made by Assignment 7 is that the deceased's conduct was negligent and contributed to his death. Assignment 7 reads as follows:

“7. The said District Court erred in failing to find that the death of George D. Early resulted from his contributory negligence and thereupon to render judgment in favor of petitioner Coggeshall Launch Company.”

The point made by Assignment 16 is that the deceased was guilty of contributory negligence in helping to create the opening through which he fell to his death. Assignment 16 reads as follows:

“16. The said District Court erred in not finding that the death of George D. Early resulted from the contributory negligence of said George D. Early in that he assisted in creating the open unprotected doorway through which he fell to his death, and in that he approached a doorway which, as was apparent to said George D. Early, was unprotected.”

TOPIC III.

Brief of the Argument.

The argument of the appellant will take the following course:

1. That from the condition of the pleadings in this cause, the petitioners were entitled to a judgment on the pleadings (Assignments 17 and 18).

2. That no negligence by Coggeshall Launch Company resulting in the death of Early has been proven (Assignments 5, 10, 11, 12, 13, 15).

3. That the facts disclose that the proximate cause of the accident was the negligence of Early or of his companions (Assignments 8 and 9).

4. That the facts disclose that Early was guilty of contributory negligence (Assignments 7 and 16).

SUBTOPIC I.

FROM THE CONDITION OF THE PLEADINGS THE PETITIONERS WERE ENTITLED TO A JUDGMENT ON THE PLEADINGS.

As stated in the Statement of Facts, the claimant has not stated a cause of action in her answer. The answer of the claimant is set forth on pages 47 to 52 inclusive of the Apostles. At the trial of the cause, and after introducing evidence to prove petitioner's lack of privity or knowledge, and prior to the presentation of claimant's case the petitioner made a general objection to the admission of any evidence by claimant. The objection and ruling are as follows:

Page 78, Apostles.

“Mr. COONAN. I desire to object to each and every question which is asked by the claimant upon his cause of action upon the ground that each and every question is immaterial, irrelevant and incompetent; and any cross-examination that I may make of any witness is not to be considered as a waiver of that

objection upon my part, or any witness that I might introduce. The only way I can safeguard my rights is by a general objection of that character.

The COURT. Objection overruled.

Mr. COONAN. Exception."

In the judgment of the Court, also, the motion for judgment on the pleadings is denied (page 298, Apostles).

In view of this situation it is the contention of appellant that the petition is affirmative only in its jurisdictional allegation, and is negative in all others; that the answer, and not the claim must state affirmatively a good cause of action, and must state the petitioners' negligence specifically in order to raise an issue with the petition.

The basis of the above contention is contained in Admiralty Rule 27:

"In all libels in causes of civil and maritime jurisdiction, whether in rem or in personam, the answer of the defendant to the allegations in the libel shall be on oath or solemn affirmation; and the answer shall be full and explicit and distinct to each separate article and separate allegation in the libel, in the same order as numbered in the libel, and shall also answer in like manner each interrogatory propounded at the close of the libel."

The applicability of this rule to a limitation of liability proceeding, and a construction thereof is ably set forth in the following words of the Court in *In re Starin*, 173 Fed. 721, at page 722:

“It has been held in *In re Davidson S. S. Co.* (D. C.), 133 Fed. 411, that in proceedings to limit liability an answer to a petition, under rule 56 of the Supreme Court of the United States (29 Sup. Ct. xlv), should be full and explicit, to the extent required by rule 27 (29 Sup. Ct. xlii) in answering a libel. And it was further held in that case that an allegation in the petition of freedom from fault was sufficient to form the issue raised by allegations of fault in the answer interposed by a claimant. But the allegations of fault were to be stated so as to meet the provisions of rule 23 (29 Sup. Ct. xli), governing a libelant’s charges of liability. As to such allegations the petitioner becomes a respondent, and, according to the decision in the Davidson case, may interpose reply to the claimant’s allegations, if he sees fit. Further, the claimant must prove his allegations of fault by affirmative evidence other than the mere presumption arising from the accident itself.

It is urged by the claimants herein that their general denial, or, in other words, their denials of the allegations of the petition, are sufficient to raise the issue involved. But it is thought that a libelant should not be called upon to contest without notice any issue that might be raised upon the trial under a mere denial of his averment that the vessel, its officers and navigators, and the owner thereof, were free from fault.”

Further on and at page 723, the Court continues:

“The case of *The Fri* (D. C.), 140 Fed. 123, *In re Starin* (D. C.), 151 Fed. 274, and *McGill v. Michigan S. S. Co.*, 144 Fed. 788, 75 C. C. A. 518, all bear out the view that the person alleging negligence should specify that negligence to the extent of framing a proper issue; and it would not appear that a mere general denial, or a

specific charge of negligence in general terms, can inform the parties or the court, to the extent that good pleading requires, where the negligence charged is based upon some particular defect, or some definite omission constituting a failure to exercise proper care."

See, also, in this connection the case of *Pere Marquette 18*, 203 Fed. 131.

The requirement that the answer must be full and explicit in effect compels pleading a good cause of action for negligence in the answer. The Court in *In re Davidson S. S. Co.*, 133 Fed. 411, states the rule at page 412:

"The claimant, though called into court by the monition to prove any claim it may have, must prove that the damage was caused by fault of petitioner's steamer, or fail of recovery. The petitioner is relieved from confession of liability by the allegations to that end in a petition; but those allegations are incidental only, and do not enter into the consideration of the primary and independent issue tendered by the petition to limit liability. Nor can they serve to relieve the claimant of the need to state and prove a cause of action when the issue of liability is reached without violating well-settled general rules governing such issues; and these rules, under the limited liability act, do not impress me as intending such reversal of the established order of pleading and proving liability."

The preceding statements bring out the fact that the law of pleading in a limitation proceeding demands that he who charges negligence must set forth a good cause of action and prove the same;

that the cause of action must be as full and explicit as a libel; that the general rules of pleading have not been wiped out in this character of proceeding. In the case now before this Court, the answer does not state a cause of action; it does not set forth a full and explicit statement of what the negligence consisted.

It will doubtless be contended that the claim set forth a good cause of action and that alone should suffice. But the law does not so read. The section of Rule 56 which refers thereto is as follows:

“ * * * and any person or persons claiming damages as aforesaid, and who shall have presented his or their claim to the commissioner under oath shall and may answer such libel or petition. * * * ”

In other words the claim is the basis for the answer. It is not the same writing. It is not even a pleading. It is a formality required to give the right to file an answer.

We cannot doubt but that it is the duty of the District Court to have allowed the petitioners to offer evidence of a general character to prove lack of privity or knowledge and then refused permission to the claimant to introduce any evidence at all. This was done in the case of *John H. Starin*, 175 Fed. 527. The Court there states at page 528:

“In the present action it would be more logical and practicable to grant the motion of the claimants to strike out their answer, leaving them with but a general denial, and forbidding them upon the trial to introduce testimony upon

the claim of unseaworthiness or negligence as to the matters covered by the particulars ordered. Thus the petitioners will have simply the burden of establishing the *prima facie* cause in those regards, and the situation will be simplified. This would be in effect a compliance with rule 30 of the Supreme Court of the United States (29 Sup. Ct. xlii) so far as it is applicable."

The preceding cases prove that the answer filed by claimant herein, raised no issue; that the petition for limitation of liability stands alone; that all evidence introduced was relevant to no issue raised and that judgment on the pleadings should be ordered in petitioner's favor.

SUBTOPIC II.

NO NEGLIGENCE RESULTING IN THE DEATH OF EARLY HAS BEEN PROVEN.

A. The common carrier owes only a high degree of care to passengers.

In the case of *Elder Dempster Shipping Co. v. Pouppirt*, 125 Fed. 732, at page 736, the Court in considering the care owing to a passenger, said:

"Assuming that the libelant occupied the position of a passenger in this steamship, and that as to him the ship was a common carrier, what was the responsibility of the shipowner to him? In *Boyce v. Anderson*, 2 Pet. 150, 7 L. Ed. 379, Chief Justice Marshall, after stating the doctrine of the common law that a carrier is responsible for every loss which is not produced by inevitable accident, says that

this doctrine cannot be applied in the case of passengers, living beings, over whom the carrier cannot have the same control as he has over inanimate matter. He applies this modification of the doctrine to the carriage of slaves, and says that in that case the carrier was only liable for ordinary neglect, that being the law with respect to the carriage of passengers."

This case is extremely valuable for the extended discussion of the question of care.

In the case of *The City of Boston*, 159 Fed. 261, the Court states at page 266:

"But the degree of care and diligence required of carriers of passengers under any circumstances is not necessarily the utmost care and diligence which men are capable of exercising, it is 'the utmost care consistent with the nature of the undertaking, and with a due regard for all other matters which ought to be considered in conducting the business'".

In the case of *Pratt v. North German Lloyd*, 184 Fed. 303, at page 304, the rule was thus stated:

"The trial judge having charged the jury very fully to the effect that the defendant was bound to exercise reasonable care under the circumstances, the plaintiff asked him to charge that the defendant owed the plaintiff 'very great care'. He declined to charge otherwise than he had charged. We think the charge was right. 'Very great care' is an unmeaning phrase, and the jury in determining what was reasonable care with reference to the circumstances would necessarily determine whether it was great or very great. Such expressions as 'the utmost care' or 'the highest degree of care' and so forth are appropriate to the seaworthiness or roadworthiness of the vehicle of transporta-

tion, or to things inherently dangerous. Obviously the degree of care appropriate to boilers or to the sufficiency of the hull of a steamer or the body of a car or stage is very different from the degree of care required with reference to the washing of decks or the maintenance of a window sash or a curtain hook."

From the preceding we may state that the following propositions of law are established:

1. That a common carrier, though an insurer of goods, is not an insurer of passengers as the latter, as living beings, have intelligence and volition and will not stay where placed.

2. The care which must be exercised is the utmost consistent with the nature of the undertaking and with a due regard for all matters to be considered in conducting a business.

3. The care varies in regard to the particular part of the vehicle it refers to.

Applying the law above stated to the particular case, the Court must consider the fact that to Early as a living being with intelligence, was not due extraordinary care. He was expected to use his intelligence in conducting himself about the ship. He knew the ship, having travelled on it for five years (page 79, Apostles). He knew the proximity of the water to the cargo-port door, and he knew that he was supposed to leave that door alone (page 222, Apostles). In spite of that fact he did open the door and took the position which resulted in his death.

Moreover the company is not called upon to display care in regard to matters incident to transportation, that it is to the hull and boilers of the ship. The court must consider the nature of the fault charged, which consisted at most, in not protecting an individual against a known custom of opening the door, a custom which did not result in a foreseen accident. In this reference it is noteworthy that an accident of this character never had occurred on the "Antelope" prior to this time and that in spite of the fact that she had carried hundreds of thousands of passengers (page 187, Apostles). See *The Southside*, 155 Fed. 364. The Court must also consider the character of Humboldt Bay, that it is a small bay and not rough, and that the trip was of only fifteen minutes duration (page 185, Apostles). Furthermore, the Court must consider the nature of the business which called for only three trips a day and which did not justify the employment of a larger number of employees to operate the boat, either from the standpoint of the business carried on, the nature of the voyage nor the capital invested. In view of all these considerations we think that the Court will hold that the care exhibited by the Coggeshall Launch Company was sufficient.

B. In order to justify a decree against the owners of the ship, the negligence charged must have been a contributing cause to the injury.

、 This proposition but states the rule that there must have been a causal connection between the

negligence charged and the injury. The rule of causal connection is fully discussed in the case of *Milwaukee Ry. Co. v. Kellogg*, 94 U. S. 469; 24 L. Ed. 256, where the Court states at page 474:

“The true rule is, that what is the proximate cause of an injury is ordinarily a question for the jury. It is not a question of science or of legal knowledge. It is to be determined as a fact, in view of the circumstances of fact attending it. The primary cause may be the proximate cause of a disaster, though it may operate through successive instruments, as an article at the end of a chain may be moved by a force applied to the other end, that force being the proximate cause of the movement, or as in the oft cited case of the squib thrown in the market place. *Scott v. Shepherd* (Squib case), 2 W. Bl. 892. The question always is: was there an unbroken connection between the wrongful act and the injury, a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? It is admitted that the rule is difficult of application. But it is generally held, that in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances. These circumstances in a case like the present, are the strength and direction of the wind, the combustible character of the elevator, its great height and the proximity and combustible nature of the saw-mill and the piles of lumber. Most of these circumstances were ignored in the request for instruction to the jury. Yet it

is obvious that the immediate and inseparable consequences of negligently firing the elevator would have been very different if the wind had been less, if the elevator had been a low building constructed of stone, if the season had been wet or if the lumber and the mill had been less combustible. And the defendants might well have anticipated or regarded the probable consequences of their negligence as much more far reaching than would have been natural or probable in other circumstances. We do not say that even the natural and probable consequences of a wrongful act or omission are in all cases to be chargeable to the misfeasance or nonfeasance. They are not when there is a sufficient and independent cause operating between the wrong and the injury. In such a case the resort of the sufferer must be to the originator of the intermediate cause. But when there is no intermediate efficient cause, the original wrong must be considered as reaching to the effect, and proximate to it. The inquiry must, therefore, always be whether there was any intermediate cause disconnected from the primary fault, and self operating, which produced the injury."

The citation brings out clearly and forcibly the rule that the negligence and injury must be linked together as a natural whole without a new and independent cause intervening between the wrong and the injury.

Consequently, if the Coggeshall Launch Company was negligent in failing to have a full complement of men, nevertheless, unless this was a proximate cause of the injury complained of, no recovery could be had. This is true even if the negligence consisted in a public wrong. It is a well known rule that

public wrong will not be a basis of negligence unless it was the proximate cause of the injury. If a driver of an automobile injures a person his negligence can not be proven by the fact he was carrying a concealed weapon in violation to a city ordinance. This principle is recognized in Admiralty. In the case of *Boston Marine Ins. Co. v. Lumber Co.*, 197 F. 703, we have a situation where the steam vessel "San Pedro" went to sea one man short, which was contrary to the rules and regulations of the inspectors. The Circuit Court of Appeals in upholding a District Court judgment that there was no causal connection between the shortage and the accident states on page 706:

"On the voyage on which the collision occurred, the San Pedro was one man short of the number of seamen required by her certificate of inspection, and it is urged that the trial court erred in finding that that shortage was not one of the proximate causes of the loss, that, if there had been a full crew, a man might have been stationed between the lookout and the officer on the bridge, to pass the word from the former to the latter. But there is no evidence that on any prior voyage any such practice had ever been adopted, or that there was any necessity therefor, or that such an intermediate lookout would have been employed if the complement of the crew had been full. There was no legal requirement for the use of such an intermediary, and there is no proof whatever that the mate did not hear all the calls of the lookout."

In the case of *Gretschmann v. Fix*, 189 Fed. 716, a situation was considered where there was an

inspector's regulation that every barge carrying passengers in tow and engaged in excursions should be supplied with two yawl boats, one to be manned and towed; where the deckhand running the yawl boat left the same to get a drink of water; where the deceased entered the yawl during the deckhand's absence, and fell overboard and was drowned. The Court states the law to the situation in the following words on page 718:

"Hence it must be affirmatively shown that the respondents, owners of the vessels, were negligent as a result of which the injury was sustained, and, furthermore, that the decedent was free from contributory negligence. *Robinson v. Detroit & C. Navigation Co.*, 73 Fed. 883, 20 C. A. 86; *The A. W. Thompson* (D. C.), 39 Fed. 115; *The City of Norwalk* (D. C.), 55 Fed. 98.

Giving force and effect to this rule it is difficult to perceive how the libelant may be permitted to recover herein. It is impossible to say that the decedent would not have entered the lifeboat if it had been properly manned. It is idle to indulge in any speculation as to what would have occurred if the deckhand Finn had remained on the lifeboat or if the decedent's associate had not first taken a seat therein. It is thought impossible to determine that the fatality was due to any other cause than the voluntary and obviously negligent act of the decedent in placing himself in the lifeboat—a dangerous place. He clearly had no right or license to enter it even though it was unattended. His stumbling or slipping while in the act of leaving the boat, as a result of which he fell into the river, was the consequence of his initial negligent act. The asserted negligence of the respondents in failing to have a

man in the lifeboat at the precise time the decedent boarded her was not the direct cause of the drowning. The absence from his post of the man appointed to man the yawl boat was not the approximate cause of the regrettable occurrence. His absence was not an invitation to the decedent to draw the boat to the stern of the barge and seat himself in her, as she obviously was not provided for such use. Neither the master of the steamer nor any one in charge of the barge had warning of the decedent's intentions, and they could not be expected to have anticipated them. The Supervising Inspectors' rule was not designed to prevent passengers from negligently entering the yawl boat; its primary purpose is to assist in relieving or rescuing passengers who might fall overboard and to give relief in case of other accident or danger to those on board."

The three decisions, unquestionably law, determine that in order to permit a recovery, the death of Early must have been the direct consequence of some negligence by the petitioners; that a negligence which has no causal connection with the injury is not a basis for a negligence action; that an intervening cause will destroy a causal connection once established. The law, as contained in the decision applied to the particular case, concludes that the violation of the inspectors' regulation does not of itself prove negligence; the fact that the boat operated with one man short was not the proximate cause of the death of Early. The presence of that man would not have prevented the accident, as he was stationed on the upper deck (page 184, *Apostles*); and assuming that the absence of the

man afforded the opportunity for Early to open the door, as in the Gretschmann case, which it did not, still the closed door was not an invitation for Early to open the same. The death of George D. Early was the result of his own initial negligent act in opening that door contrary to warning by the boat (page 222, Apostles), an act which exposed him to a danger resulting in the loss of his life.

SUBTOPIC III.

THE FACTS DISCLOSE THAT THE PROXIMATE CAUSE OF THE ACCIDENT WAS THE NEGLIGENCE OF EARLY OR OF HIS COMPANIONS.

This proposition is here given a consideration upon the assumption that Early and his companions were warned not to touch the door which, when opened by them, afforded the space through which Early fell into the water. There is considerable evidence of such warning not to open the door being given and was so found by the District Court, which, however, was not satisfied that the warning had been heard by Early, and which contended that the attempts to enforce the warning eventually resulted in acquiescence to the same.

In considering the proposition of this subtopic it is necessary to also consider a number of rules of law which bear upon it. In particular appellant believes that:

a. Where a position on or mode of egress from a carrier is dangerous, and the danger is apparent,

a passenger can not recover for injuries caused while occupying the dangerous position or taking the dangerous mode of egress.

b. Where the passenger was requested not to occupy a dangerous position and refused to comply, he assumes the dangers attendant upon occupying the same.

c. Where the carrier had a rule that a certain position on the carrier should not be occupied by passengers and, although it publishes the same, does not enforce the rule, and the passenger is injured by violating the same, mere non-interference of the carrier does not vitiate the risk assumed by the passenger.

d. Where an accident occurred in an unforeseen way, the carrier is not liable, and the fact that a notice has been given warning a passenger away from the particular place, is not necessarily evidence that the accident could have been foreseen.

A. Where a position on or mode of egress from a carrier is dangerous and the danger is apparent, a passenger can not recover for injuries incurred while occupying the dangerous position or taking the dangerous mode of egress.

In the case of *Plant Ins. Co. v. Cook*, 85 Fed. 611, the Court was confronted with a situation where the carrier had provided a rough gangplank with a row of cleats extending down a slippery incline; where the passenger disregarding the two safe modes of ingress, walked between the rough gangplank

and the cleated sections, slipped on the same and was injured. The Court in holding that the injury was the result of the negligence of the passenger states at page 613:

“It is certainly well established, and should be thoroughly understood, that passengers cannot willfully disregard the measures provided by transportation companies for their protection and safety, and deliberately go between and past them, onto slippery and dangerous places, and thus cause their injury, and then recover damages. If this were possible, it would be difficult to conceive of a condition where the company would not be liable for accident under any circumstances, regardless of the amount of care they might take.”

In the case of *Elder Dempster Shipping Co. v. Pouppirt*, 125 Fed. 732, the passenger went forward from the bridge of the carrier, to a point where the crew were tearing away certain housing which had become unnecessary. A large timber was cast overboard by the crew and in swinging with the water, the upper end, which was still on the ship, moved forward across the deck and struck the libellant. The Court states on page 739:

“Why did he go there? He knew that on the bridge he was safe. He could not avoid knowing that on the Montenegro, where the work was going on, he was in more or less danger. There certainly was no necessity for him to go down upon this deck. He did it voluntarily. If he went there from curiosity, or to take exercise, or from any other motive, he was using his right as a reasonable being, but at the same time he assumed the risk. He could only have been prevented from doing that

which he did by being shown the danger, which was unnecessary, as he could himself see it without being told, or by being forcibly arrested, carried back to the cabin, and confined there—a doubtful proceeding with regard to one not one of the crew.”

Further on the Court says:

“Can it be said that under these peculiar and unusual circumstances the shipowner owed a duty to the libelant to warn him of that which he already knew, and to station a man to pull him out of a danger from which he, of his own prudence, should have retreated? Unless there was a duty there was no negligence, and unless there was negligence there can be no recovery.”

From the statement of facts the Court concludes on page 740:

“In our opinion, the proximate cause of the injury was the act of the libelant himself. He was in a place in which he had no occasion to be, certainly no necessity for being. He suffered the consequence of his own act.”

See, also,

Strutt v. Brooklyn & R. B. R. Co., 45 N. Y. S.
728.

If the rule set forth above is correct, and if we can say in the particular case that Early deliberately chose to take a position in a doorway opened by himself, a doorway which opened directly upon the deep waters of the bay, will this Court not hold that the conditions were created by himself, and that the resulting death was caused by his negligence and no other?

A stronger case can not be conceived. Early was not a child. He was a man of twenty years (page 79, Apostles). For five years he had been earning his own livelihood (page 79, Apostles). He had worked in a lumber mill, where the Court knows dangers lurk in every saw, in every chute, in every log, in every gangway along which vehicles are passing.

Early was a grown man accustomed to looking out for himself. More than that he was familiar with the "Antelope" as he had travelled on it for five years (page 79, Apostles). In spite of his age and his intelligence he deliberately opened a door, and was drowned as a result thereof. Did he not go to a place of danger voluntarily and was not the injury a result of his own negligence?

But the Pouppirt case was not one where a warning was given. In our case warning had been repeatedly given (page 222, Apostles). Early is deemed to know of any warning which is published, having travelled on the boat for five years. In view of this added factor, not found in the Pouppirt case, should not the rule in this case be that

"passengers cannot wilfully disregard the measures provided by transportation companies for their protection and safety, and deliberately go * * * onto * * * dangerous places"?

The law has gone still further than the preceding decisions delineate. It has been determined that where the passenger, not only has not been warned against a particular dangerous mode of egress, but has been practically invited to take the particular

dangerous mode, still the passenger and not the carrier is liable for an injury resulting from the use. *Watson v. Ry.*, a New Jersey case reported 19 L. R. A. 487, is a case recognizing the principle, but holding against the carrier because of the facts did not come within the principle. The annotation states that "The interest of the above case is in illustration of established principles in the particular facts of the case". As much as is important to this discussion is contained in the words of the Court at page 488:

"The proofs satisfactorily establish that the plaintiff was practically invited by the defendant's employees to pass from the boat by the vehicle way. The northerly passenger exit was closed. The southerly exit was narrow. When the boat was made fast to the bridge, although there were no animals or vehicles upon it, a gangplank or slide was drawn to it from the bridge, and the vehicle way gate, behind which there was a waiting crowd, was thrown open, as though a signal to the crowd to pass off that way. The plaintiff was among the first of those who availed themselves of this offered exit. The use for which the way he took was designed, was the transfer of controlled animals and vehicles to and from the boat. Passage over it brought to him knowledge of its customary use, and suggested a prudent watchfulness against the dangers attendant upon that use. In other words, it was a place of obvious danger from a certain use, against which it was the plaintiff's duty to guard, and the invitation to pass that way did not absolve him from the reasonable performance of his duty in this respect."

This case concludes the claimant of any cause of action. Early was not invited to adopt a particular position. He did it of his own volition. But even if he had been invited, still the carrier would not be liable.

B. Where the passenger was requested not to occupy a dangerous position and he refused to comply, he assumes the dangers attendant upon occupying the same.

In the case of *Fisher v. West Virginia & Pittsburgh Ry. Co.*, a West Virginia case reported in 23 L. R. A. 758, we find a very full and learned discussion of the relative duties of carrier and passenger in view of a situation where the passenger disobeys an order not to ride upon the platform of a car. As the whole question is much better discussed in the citation itself than it could be by any consideration given to it by the writer of this brief, the writer recommends the case to the Court.

C. Where the carrier had a rule that a certain position on the carrier should not be occupied by passengers, and although it publishes the same it does not enforce the rule, and a passenger is injured by violating the same, the mere non-interference of the carrier does not vitiate the risk assumed by the passenger.

Certainly the mere silent acquiescence or non-interference of the carrier's conductor or agent in

charge of the vehicle will not authorize the person to ride in a place he knows to be dangerous.

Files v. Boston etc. Ry. Co., 149 Mass. 204;

21 N. E. 311; 14 A. S. R. 411;

Radley v. Columbia River Co., 44 Ore. 332;

75 Pac. 212; 1 Am. Cases 447.

In the case of *Dodge v. Boston & B. S. S. Co.*, a Massachusetts case reported in 2 L. R. A. 83, we find a situation where the carrier had provided a safe and convenient place for passengers to land from the saloon deck, and where in spite of this fact, the passenger walked ashore over a plank thrown from the ship to the wharf, and was injured. The Court stated its view in no uncertain language on page 87:

“A passenger is bound to obey all reasonable rules and orders of a carrier in reference to the business. The carrier may assume that he will obey. And the carrier owes him no duty to provide for his safety in acting in disobedience. His neglect of his duty in disobeying in the absence of a good reason for it, will prevent his recovery for an injury growing out of it.”

How do the facts of our case fit in with the law stated in the preceding cases? The Coggeshall Launch Company had reasonable rules, and it had a right to assume that Early would obey them. Moreover the Coggeshall Launch Company owed him no duty to provide for his safety while he was acting in disobedience. Early took a place not appropriate for the carriage of passengers. There is no evidence of incompetence or mismanagement on the part

of the crew, nor was the passageway insecure. The precautions of the company were ample. The door was enclosed making the lower deck a safe place to ride. Early was familiar with the boat. It required no great degree of intelligence to understand that the lower deck was more dangerous with the door open, and it was apparent why it was closed.

Certainly, Early was drowned through his own negligence.

D. Where an accident occurred in an unforeseen way, the carrier is not liable and the fact that a notice has been given warning a passenger away from a particular place is not necessarily evidence that the accident could have been foreseen.

The above proposition presents one phase of appellant's position. The facts disclose that there was no necessity of keeping the door closed and the bar up, as the steamship inspectors had required the bar up only when the door was open (pages 175, 177, Apostles). The District Court came to the conclusion that in spite of these regulations, still as a matter of practice the bar was always up even when the door was closed (page 278, Apostles). This conclusion has some basis of testimony upon which to rest, but of the nine witnesses who testified to the fact, four unimpeached witnesses gave evidence that the bar was often down when the door was closed (pages 182, 211, 226, 257, Apostles). Three testified they had never seen the bar down and the door closed (pages 85, 121, 139, Apostles),

one of whom was William Early, a brother of deceased (page 8, Apostles), and another, Otto Johnson, had been travelling on the "Antelope" only three or four weeks (page 138, Apostles) and he admitted he had, on the day of the trial, made a different statement (page 142, Apostles). And of the remaining witnesses one Alva Moss, testified the bar had always been up (page 105, Apostles) but admitted he had made a contrary statement five months before the trial and the other testified in his direct examination that the bar had always been up (page 147, Apostles) and then reversed himself in his cross-examination (page 152, Apostles). The facts further disclose that for a long time the Coggeshall Launch Company had warned the passengers not to open the cargo port door or remove the bar or use the freight gang plank as a mode of egress (pages 222, 259, Apostles). Early had travelled on the ferry boat for five years and is presumed to have heard the warning, to have known it and to have been acquainted with his surroundings (page 79, Apostles). He disregarded the injunction on the particular occasion and placed himself in a position which resulted in his death. The Coggeshall Launch Company had never experienced a like accident. Never had a man fallen from the lower deck into the bay. The "Antelope" had carried many hundreds of thousands of passengers on Humboldt Bay (page 187, Apostles). The ground upon which the contention is to be sustained is one of law. The following decisions decide the main proposition.

Among a number of immigrants on the steamer Noordland, as the vessel was docking December 25, 1907, was a child, Ichil Kohn. He became separated from his mother, and in some way not explained, placed his hand in a hawse hole through which a heavy cable passed. As it moved, it ground off three of the child's fingers. In considering the case in *Kohn v. International Mercantile Marine Co.*, 180 Fed. 495, the Court at page 496 states:

"It seems clear that the only ground upon which negligence can be charged against the respondent is the failure to keep the passengers away from the hawse hole. The respondent was not obliged to have a permanent guard about the hole, any more than the *Burgundia* (D. C.) (29 Fed. 264) was obliged to protect a rudder chain which was carried in an open trough across the main deck. Cables must have room to play and to be moved about, and it is evident I think that a permanent protection could not be properly required. It is therefore clear, in my opinion, that if any duty rested upon the ship it was to do one of two things: Either to station a man at the hawse hole to be continually on guard, or else to rope off that part of the deck altogether. There is no evidence that the hawser was improperly put into service, or that any negligence caused it to slip or to jerk. So far as appears, the work of getting the ship to the dock was being carefully carried on, and it is certain that the mere tightening of the cable was not in itself a negligent act. Unless, therefore, there was negligence in failing to anticipate that small children, incapable of observing and understanding the danger presented by the rope and the hole in combination, might be in the neighborhood without a caretaker—for ordinarily there was

no peril in the situation, and adults might properly be expected to look out for themselves and for those in their immediate charge—and in failing to take precautions against such contingency, there is no liability on the part of the respondent. Upon this question I am of opinion that the contingency was too remote to impose the duty of guarding against it, and therefore that the respondent's negligence has not been established."

In the case of *The Caracas*, 163 Fed. 662, at page 663, an unforeseen accident was considered in the following language:

"It would seem that if the libellant, in order to avoid the discomfort of a wetting, attempted to climb upon the skylight, and thereby pulled the protecting frame from the glass, and then leaned upon the glass, no liability should rest upon the vessel. Certainly no negligence can be imputed for an occurrence happening in this manner and under such circumstances. The testimony of the ship's officers, and of every one connected with the matter, is that the rods in the protecting frame were not of sufficient strength to hold a person leaning his full weight upon one hand, or planting a foot upon the frame. But the libellant charges that the accident happened when the frame was not in place, and therefore the question as to whether the frame was sufficiently heavy to protect a person from falling need not be considered. The skylight was not intended as a place upon which to sit, nor to climb, and the frame was designed to protect the glass from objects of any sort which might fall thereon. It cannot be considered negligence to have not anticipated that this frame could be pulled from its place by a man of ordinary size, when tossed around by the motion of the ship, or slipping back

under the effect of an extraordinary wave. Such an occurrence is an accident pure and simple.”

The facts of the case of *The Southside*, 155 Fed. 364, were in a great measure like those of the case at bar. The decedent fell overboard and was drowned. The evidence brought out that he had been leaning on the gates at the front end of the boat, and through some moving of his or lurching of the boat he fell from the deck. The gates seemed to be in good order. There was a notice “Hands off the gates”. In our case we have a passenger familiar with his surroundings, not merely leaning against a good and sufficient gate, but opening it and taking a position which resulted in his falling overboard and drowning. We have not only a passive negligent act but a positive negligent act by the deceased. In view of the similarity of facts it is well to consider the wording of the decision on page 368:

“It has been urged that other people leaned against the gate but that seems to be immaterial. When the gates were erected notice was printed in a conspicuous place near them that they were not to be handled. When a passenger did handle them, notwithstanding the warning, and came to grief, it seems to have been a case of negligence on his part fully accounting for the accident.

The fact that millions of passengers were carried on this boat and similar ones during a series of years without any accident happening from the use of the gates is strong proof that the petitioner could not anticipate any such trouble as ensued, and is therefore not liable

for the result of this accident. *Cleveland v. New Jersey Steamboat Co.*, 68 N. Y. 310; *Loftus v. Union Ferry Co. of Brooklyn*, 84 N. Y. 455, 38 Am. Rep. 533; *Hubbell v. The City of Yonkers*, 104 N. Y. 434, 10 N. E. 585, 58 Am. Rep. 522; *Race v. Union Ferry Co. of New York and Brooklyn*, 138 N. Y. 644, 34 N. E. 280."

The Court particularly discusses the question of other people leaning on the posts and holds it is immaterial; that the material thing is whether a passenger handled the gates in spite of a warning. In our case, too, the fact that others had handled the cargo-port door was immaterial. The fact that Early in spite of the warning repeatedly given to the passengers handled the door and came to grief is the material thing. The second matter which the excerpt discusses is the evidence pointing to the accident being unforeseen. The Court recognizes that the fact that a great many passengers were carried without an accident similar to this is strong proof that the accident was unforeseen. There is absolutely no evidence that a single accident ever occurred of this nature and there is evidence that no accident of this character had happened in the history of the boat, and that in spite of the fact that she had carried at least three hundred thousand passengers. The accident being unforeseen is one for which the petitioners are not liable.

The rule of *The Southside*, *supra*, and here presented is strong authority that the contingency which

occurred in this case was not to be foreseen. In *Milwaukee Ry. Co. v. Kellogg, supra*, the Court states the rule that

“it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of attending circumstances”.

If no such accident had happened prior to this time, that fact is strong evidence that the accident was not foreseeable “in the light of attending circumstances”.

The inverse of this rule, to wit: the value of evidence of similar accidents, is recognized in *Leslie Ingallo v. Monte Christo O. & D. Co.*, 54 Cal. Dec. 319.

SUBTOPIC IV.

THE FACTS DISCLOSE THAT EARLY WAS GUILTY OF CONTRIBUTORY NEGLIGENCE.

This subtopic discusses the situation upon the assumption that the Coggeshall Launch Company was negligent; but in spite of this negligence the appellant contends that the judgment of the District Court was in error because the deceased did not act as an ordinary prudent man would have under the circumstances.

The first consideration is the circumstances under which it is contended Early acted negligently. The judgment rendered by the District Court is not

explicit as to the facts upon which the same is based (see page 296, Apostles). The opinion of the Court, however, states the facts briefly as follows:

“This lower deck is almost on a level with the surface of the water, and is wholly enclosed. On the starboard side, however, through this enclosure there is a doorway six or eight feet wide, known as the cargo-port, through which it was the custom of petitioners on the Samoa side to take on both passengers and freight. This doorway is closed by a sliding door, which is opened by sliding it aft. When the door is open and the vessel is away from the dock, the open doorway leads right out to the water, and there is nothing to prevent a passenger from falling or walking directly through it into the water, as outside of the door there is but a guard, level with the deck, and about a foot in width. As a protection to the passengers on the lower deck therefore, a bar about six inches in width, and, when in place, extending across the port opening at a height of between three and four feet, had been provided by order of the inspector (pages 277, 278, Apostles).

On the evening of January 15th, 1915, and with conditions on the ‘Antelope’ as above set forth, George D. Early was a passenger from Samoa to Eureka, and was among those carried on the lower deck. He had been going back and forth on the vessel between Eureka and Samoa for several years. On this evening as the vessel approached the Eureka side the cargo-port door was opened as usual by one of the passengers. Indeed, it was opened by the same passenger who had closed it before leaving Samoa. He was assisted in opening the door by another passenger and when the door was within about two feet of being fully opened it stuck, and the two passengers who had opened it thus far seemed unable to get it fully opened. At this stage of the proceedings Early came to their

assistance and placed his hand on the door to aid in shoving it back, and whether because of a lurching of the vessel, or because the support afforded him by the door failed him by reason of its sliding further back, he fell apparently backwards through the open doorway into the waters of the bay and was drowned (page 281, Apostles).

It must be observed in this connection that deceased did not open the door at all at the place where he fell through (page 284, Apostles).

From all the surrounding circumstances I am compelled to the belief that with his attention fixed on the door which had stuck, he approached it with his side to the doorway, without observing or pausing to observe its unprotected condition, but relying on the fact that the bar had always been in place. It was between five-thirty and six o'clock in the evening of January 15th, and while not yet dark, it was not wholly light. And though an examination would have disclosed to him the absence of the protecting bar," etc. (page 285, Apostles).

The facts as set forth in the opinion, though fairly explicit do not state the whole of the testimony of the witnesses; and when reference is made in this subtopic to witnesses, it is desired that the Circuit Court of Appeals know that *every bit of evidence upon which this argument will be based is from the lips of the appellee, and her witnesses*, except on the one point of the condition of the light. Appellant believes that the District Judge's finding that "while not yet dark it was not wholly light" is consistent with appellee's witness, Emmett Whelihan, who testified on that point (page 152, Apostles), and

with appellant's witnesses John Mason and E. J. Weber (pages 205, 213, Apostles).

The following is therefore a statement of the facts of interest in this investigation and testified to, with the above exception, by appellee's witnesses.

On the lower deck of the "Antelope" there was a large doorway, the bottom of which was a foot or a foot and a half above the water edge (Apostles, pp. 81, 82). This doorway was about seven or eight feet wide (Apostles, p. 82). A door to this opening, which was on the starboard side of the ship, slid toward the stern of the ship when being opened (Apostles, p. 140). On the outside of the doorway there was a place for a bar, which protected the opening when the door was open (Apostles, p. 82). This bar was about three feet from the deck and could be removed (Apostles, p. 82). The bar was always up whether the door was opened or closed (Apostles, p. 100). This bar was five or six inches wide (Apostles, p. 116), and was an inch or two outside the doorway (Apostles, p. 117). Outside and on a level with the lower deck was a guard rail half a foot to a foot wide (Apostles, pp. 82, 132).

The deceased had been travelling on the "Antelope" for five years prior to the accident (Apostles, p. 79) and was at that time twenty years of age (Apostles, p. 79). There was a number of boys, close friends of the deceased, who were accustomed to ride on the lower deck sitting near the door (Apostles, pp. 101, 120). Among these close friends

or acquaintances were Alva Moss (Apostles, p. 101), who had travelled on the "Antelope" for three years (Apostles, p. 93), Joseph Whelihan (Apostles, p. 126) and Emmett Whelihan (Apostles, p. 146). The passengers were accustomed to open and close the door (Apostles, pp. 95, 120), and these boys who travelled with the deceased had done so (Apostles, pp. 100, 120). Also they would take down the bar (Apostles, p. 153). Early had opened the door before that night and had taken down the bar (Apostles, pp. 153, 154).

On the particular night of the accident Alva Moss went over and closed the door while the vessel was at Samoa (Apostles, p. 95). He noticed the bar was down (Apostles, p. 106). There is no evidence that Moss mentioned this fact to Early or any other of the passengers. The deceased was riding on this lower deck leaning against the wall on the starboard side of the ship (Apostles, p. 156). He was with Joseph Whelihan, Alva Moss and Emmett Whelihan and about three feet from the door (Apostles, pp. 120, 122). On the way over and in accordance with their custom (Apostles, p. 120) two of the boys, Alva Moss and Emmett Whelihan, opened the door (Apostles, pp. 97, 146). The door, however, stuck about one or two feet from being entirely open (Apostles, pp. 97, 146), and Early got up and assisted completing the opening of the door (Apostles, pp. 102, 122). While the three boys were working in completing the opening of the door (Apostles, p. 135) Moss was the inside man (Apostles, p. 117),

Early was in the middle (Apostles, pp. 135, 136), and the third fellow, evidently Emmett Whelihan, was pushing on the outside (Apostles, p. 134). Whelihan knew that he was pushing upon the door but he does not know his position (Apostles, p. 154). The evidence is confusing as to which hand Early used in pushing on the door. Moss testified that it must have been his right (Apostles, p. 107). Joseph Whelihan says he pushed with his left hand (Apostles, p. 134) and then again states it was the right hand (Apostles, p. 135). Emmett Whelihan does not know which hand Early used (Apostles, p. 151). The pushing of the three was exerted at the lock end of the door with the outside man not very far from where the bar would have been if in place (Apostles, p. 136). When the boys got the door open Early stepped back a foot and leaned as if he expected the door but there was no door there (Apostles, p. 130). There is other evidence to the effect that Early leaned back to where the bar should have been (Apostles, p. 122), that his arms went up in the air (Apostles, p. 107) and he fell into the water (Apostles, p. 122).

The evidence of Otto Johnson also offered by the appellee and the only one of the witnesses not shown to have been on intimate terms with the deceased, testified that after assisting in shoving at the door, Early stepped back out onto the guard rail, across the point where the bar would be, lost his balance sideways and backwards and fell overboard (Apostles, pp. 140, 141).

There is no evidence in regard to any obstruction causing the fall. Neither Moss nor Emmett Whelihan know how Early's accident occurred (Apostles, pp. 116, 172).

It was testified to that the boys were in the habit of leaning on the bar (Apostles, pp. 101, 116, 147). Early indulged in this habit (Apostles, p. 147) and the position occupied would be one of facing the water (Apostles, p. 131).

It appears from the evidence that Early had been riding with Joseph Whelihan, among others (Apostles, p. 122) three feet from the door (Apostles, p. 120); that he observed that the two boys were unsuccessful in their attempt to open the door, and that the door stuck (Apostles, pp. 122, 102, 146), and going over to lend a hand, Early walked toward Emmett Whelihan, walking toward the door part of the time (Apostles, p. 165). When he fell, he fell past Emmett Whelihan kicking Whelihan on the heel (Apostles, p. 152). Whelihan had been on the outside of Early, while pushing on the door (Apostles, pp. 135, 136, 134) and had his back to Early at the time he fell (Apostles, pp. 152, 155).

It was not dark at the time of the accident though it was not wholly light (Apostles, pp. 285, 152, 205, 213). There was sufficient light to see that the bar was not up (Apostles, p. 152). Every witness offered by the appellee knew the bar was not in place. Alva Moss noticed it at the time of closing the door at Samoa, and said nothing about it

(Apostles, p. 106. Joseph Whelihan said that he saw the bar was not up (Apostles, p. 131). Emmett Whelihan noticed that the bar was not up when he started to open the door that night (Apostles, p. 152), and Otto Johnson, the fourth of the witnesses, who testified to the happening of the accident, also offered by the Appellee, noticed that the bar was down (Apostles, p. 141). All four witnesses, the only ones who saw the accident itself, three close friends of the deceased, all offered by appellee, one a few minutes before had noticed the absence of the bar in closing the door, and the remaining three had noticed its absence on the opening of the door.

In view of the facts as set forth above the appellants have made the proposition that deceased was guilty of contributory negligence.

Early, on the night of the accident, was standing three feet from the door. He saw his companions open it. He saw the door stick when it was about one foot from wide open. He went toward the door, aided in opening the door, presumably with the right hand, which, when pushing on a sliding door running from stem to stern on the starboard side of a vessel, would have him facing the water. He either saw and disregarded or heedlessly failed to see that there was absent from its accustomed place, a bar which was five or six inches across, and when in place extended the whole length of the opening seven or eight feet long, about three feet from the

floor. The other witnesses to the accident knew of its absence.

The general rule of contributory negligence of passengers is defined in *10 C. J.*, 1096, in the following words:

“A passenger must exercise ordinary care, and such care only, for his own safety, that is, such care as an ordinarily prudent man would exercise for his safety and security under the same circumstances, and it is a well established rule, that, although there has been negligence on the part of the carrier contributing to the injuries, if the passenger fails to exercise ordinary care and his failure is proximately connected with his injuries he is guilty of contributory negligence which will defeat a recovery.”

The question is then presented: Did Early fail to exercise ordinary care which proximately resulted in his death? The appellant believes that he did, in either failing to note the absence of the bar or in disregarding the absence of the bar, if he saw it.

The rule in this particular is as follows:

“A person is bound to use the senses and exercise the reasoning faculties with which nature has endowed him. If he fails to do so and is injured in consequence neither he, in life, nor his representatives after his death, can recover for resulting injuries.”

Stewart v. Pennsylvania Co., 130 Ind. 242;
29 N. E. 916.

Did Early use his senses and the reasoning faculties with which nature endowed him? In answer-

ing this interrogation in the negative appellant has relied upon the following character of cases:

a. Cases whose facts submit to no general characterization except that they involve the principle that a person must use his senses and his reasoning faculties.

b. Cases in which the plaintiff has been held to be contributorily negligent in failing to avoid an unguarded space in a building owned by the defendants.

c. Cases in which the plaintiff has been held to be contributorily negligent in failing to avoid unguarded spaces in or about elevators.

A. Cases whose facts submit to no general characterization except that they involve the principle that a person must use his senses and his reasoning faculties.

The first case is that of *Whalen v. Gas Light Co.*, 151 N. Y. 281; 45 N. E. 363, wherein the plaintiff tripped over a stone flag. In considering the question of contributory negligence the Court states:

“It was a bright day about 11 o’clock in the forenoon. The obstacle over which the plaintiff fell was a large flag stone over four feet in length and three feet in breadth. There was nothing to obscure her vision, her eyesight was good, and she could see as she was walking along the walk. It was not pretended that anything occurred that momentarily obstructed her vision and it is difficult to conceive how she could have avoided seeing the obstacle unless she was heedlessly proceeding in utter disregard

of the precautions usually taken by careful and prudent people."

In an Indiana case, *Day v. Cleveland C. C. & St. L. R. Co.*, 137 Ind. 206, 36 N. E. 854, the plaintiff, a carpenter in defendant's repair shops, while assisting in obedience to the foreman's order in pushing cars was injured by the fall of a running board which had been improperly left in a dangerous position between cars; neither the plaintiff nor foreman knew that the board had been removed. The Court determined that the plaintiff was guilty of contributory negligence in the following words at page 855:

"The applicant was ignorant that the running board had not been removed or rescued. The appellant could easily have seen it if he had looked, and, in his testimony gives as the only reason for not looking that he supposed it was not his duty to look but that it was the duty of somebody else to look out for his safety";

and farther on the Court states at page 855:

"In a case where the servant is one of mature age and experience as in this case, the law never imposes the duty on the master of becoming eyes and ears for his servant where there is nothing to prevent the servant from using his own eyes and ears to avoid danger."

From the preceding cases it may be said then that where there was nothing to obscure the vision of the plaintiff, whose eyesight was good and the obstacle was large, or where if plaintiff had looked he would have seen the danger, the plaintiff has

not used his senses and faculties as an ordinarily prudent person.

B. Cases in which the plaintiff has been held to be contributorily negligent in failing to avoid an open space in a building owned by the defendant.

In the case of *Johnson v. Ramberg*, 49 Minn. 341; 51 N. W. 1043, plaintiff was a customer of defendant who entered defendant's store by a warehouse. Plaintiff fell through an open and unprotected doorway. In discussing the case the Court says at page 1043:

“The evidence shows conclusively and without denial that the room was so light that any one who looked about him would see the open doorway. The plaintiff admits that he could have seen if he had looked but that he did not look. Not only was the wareroom light but the stairway and the cellar below were light. While the plaintiff was permitted to pass through the wareroom into the store, he could not but know from the surroundings that the place was not a passageway, merely, but that it was also largely, if not principally devoted to the private use of the proprietor connected with his business; and the plaintiff was not justified either in closing his eyes as he went through or neglecting to observe where he went.”

The preceding case is one where the plaintiff was not familiar with the surroundings but was held to be negligent. In the case of *Quirk v. Siegel-Cooper Co.*, 60 N. Y. S. 228, affirming same case in 56 N. Y. S. 49, which held that the plaintiff had not been negligent though familiar with the place, the

facts disclose that the plaintiff, a customer, in defendant's store, slipped on an inclined plane temporarily placed on a stairway leading to the basement. On page 229 the Court states:

"The plaintiff testified that she had been over the steps only the day before and there was no board there then. She said the light from without was somewhat obscured by the display of goods nearby. She knew she was approaching and was about to go down the stairs, but there was nothing to suggest any danger in going on unless she had looked right down at the very spot where she intended to place her advancing foot. Under the circumstances it cannot be held that she was bound to do this as a matter of law."

In differentiating this case with others the Court says at page 230:

"In *Strutt v. Railroad Co.*, 18 App. Div. 134; 45 N. Y. S. 728, there was no lack of light or other condition tending to interfere with easy observation of the obstacle which caused the accident. The same is true of *Whalen v. Light Co.*, 151 N. Y. 70; 45 N. E. 363."

A case also decided in New York in which a determination was had for the defendant on the ground of plaintiff's contributory negligence was *Sparks v. Siebrecht*, 45 N. Y. S. 993; 19 App. Div. 117.

There the room was light and there was no difficulty in observing the open and unguarded trap-door, and all the companions of the plaintiff saw and avoided it. It was plaintiff's first time in the building. The Court held at page 993:

“She walked along without exercising any care whatever to see where she was going. All her companions saw the opening and avoided it. She did not look and her entire failure to exercise any care was the cause of the accident.”

These cases are extremely interesting as giving a basis of circumstances under which it may be said that contributory negligence will be found. The factors really resolve themselves down to conditions of observability. The condition of the light, familiarity with the premises, the position of the factor which caused the fall and the experience of others as regards this factor, are the conditions on which the determination is made. In *Johnson v. Ramberg, supra*, the plaintiff was in a well lighted but unfamiliar room. However, the open doorway was apparent and the Court held there was contributory negligence. In the case of *Quirk v. Siegel-Cooper Co., supra*, plaintiff was familiar with the premises, the light was obscured by a display of goods and the factor which caused the fall, to wit: inclined plane on the stairs, was not apparent unless the plaintiff looked down at the very spot where she intended to place her advancing foot. The Court held that there was no contributory negligence. In so determining the Court compares the situation with that of other cases where contributory negligence was found and points out that in these latter cases there was no lack of light and the factor which caused the accident was not obscured by any object and was so placed as to be

within easy observation of the plaintiff. One of the cases cited was *Whalen v. Light Co.*, wherein it was held that though the object was on the ground and plaintiff was unfamiliar with the premises, still because it was light and the object was large, the plaintiff was guilty of contributory negligence. The factors in *Sparks v. Siebrecht, supra*, were that the opening was apparent, and that the plaintiff's companions all saw it, and the Court held there was contributory negligence in failing to avoid the opening.

Taking then the factors of observability relied upon by the Courts in determining these cases, what is the situation in the case now before the Court? Early was familiar with the premises as he had been travelling on the "Antelope" for five years (Apostles, p. 79). He was standing about three feet from the door (Apostles, pp. 122, 120). He observed that his companions had failed in their attempt to completely open the door (Apostles, pp. 122, 102, 146). If he observed this fact he must have also observed the opening created by the door as it was being opened. He approached the door (Apostles, p. 156) and pushed on the same in close proximity of where the bar usually was placed (Apostles, p. 136). It was not dark though not wholly light (Apostles, pp. 185, 152). There was enough light to see that the bar was not up (Apostles, p. 152). The bar itself when in place was three feet from the ground (Apostles, p. 82), extended seven or eight feet (Apostles, p.

82), and was five or six inches wide (Apostles, p. 116). The companions and the only other witness who saw the accident observed that the bar was not in place (Apostles, pp. 106, 131, 152, 141), and evidently believed it so apparent that they did not warn Early.

From the preceding cases, only one factor can be considered as weighing against the contention of contributory negligence and that is familiarity of the decedent. Even that, as will be shown later, is a factor which has been considered by the Courts as a factor in favor of the contention. But assuming that that factor negatives a claim of contributory negligence, nevertheless the situation in the present case presents more factors of observability than any case so far considered. Early had sufficient light to note the absence of the bar; the bar was not at his feet but three feet from the deck; it was not a small object, the absence of which could not be easily noticed, but a large bar five or six inches across and seven or eight feet long. Early did not suddenly come upon the opening. He was near when the door was being opened; he noticed the act of opening the door; he himself approached the door and assisted in completing the opening and finally all the witnesses saw the absence of the bar. From these decisions and these facts appellant contends that Early failed to use his senses and reasoning faculties as an ordinarily prudent man.

C. Cases in which the plaintiff has been held to be contributorily negligent in failing to avoid unguarded spaces in or about elevators.

In discussing this heading appellant desires to point out that there are a great many points of similarity between elevator cases and the one now before the Court.

“Owners of elevators, although not strictly common carriers of passengers, owe the same duty to those who by invitation express or implied, are transported in the cars of such elevators * * *”

10 C. J. 962.

Moreover the item of danger, calling upon passengers in elevators to be cautious is present in this case. The danger of an elevator consists usually in an unprotected door or other aperture customarily used by human beings which leads to a dangerous elevator well, and the danger in the present case is in leaving an unprotected opening leading to the waters of the bay. With this similarity in mind the appellant desires to call the Court's attention:

First, to elevator cases in general.

Secondly, to elevator cases where a bar, has not been in place.

Thirdly, a California elevator case.

1. Elevator cases in general.

In the case of *Stanwood v. Clancey*, (Me.) 75 Atl. 293, the plaintiff, a licensee in the building, was in-

jured by stepping into an elevator shaft, the door of which had been left open. The Court states at page 294:

“In the first place if the plaintiff was paying the slightest attention to the situation it is difficult to see how he could have mistaken the opening into the darkness of an elevator well for the entrance to an office as he testified he supposed it was. It was a sunshiny day and the door from the street was wide open and only five feet from the elevator. It is impossible to resist the conclusion that the plaintiff was guilty of that thoughtless inattention which has been said to be the very essence of negligence.”

In the case of *Ballou v. Collamore*, 160 Mass. 246; 35 N. E. 463, the plaintiff was familiar with the elevator and back stairs of the hotel. He stepped out at the fourth floor of the freight end of an elevator, opened a sliding door of the elevator well and delivered a package. In his absence the elevator boy took a passenger up in the elevator. At page 464 the Court states:

“Assuming that the elevator was still there the plaintiff went back, and, without looking to see if it was, stepped through the open door and fell to the bottom of the well. The plaintiff knew that the elevator boy could not shut the door without raising the elevator and getting from the passenger part of it into the freight box, and then lowering it to the door. It was not possible to see from the passenger part of the elevator into the freight box and there was no door in the passenger part of the elevator on the side which was above the door into the

elevator well. The plaintiff contends that there is testimony tending to show that the elevator boy sometimes waited for him when there were passengers in the elevator and that he did not usually shut the door into the elevator well unless told by the elevator boy to do so and he relies upon this as showing due care on his part. But the plaintiff expressly admitted that nothing was said by the elevator boy to him or by him to the elevator boy about the latter's waiting for him. It was at least as probable that he would not wait as that he would. Under the circumstances even a boy of 15 to step through the open door into the elevator well without looking to see if the elevator was there was careless."

And later on at page 464 the Court adds the plaintiff opened the door and knew or ought to have known that at least it was as probable the elevator would be there as not. See also in this connection *Gilfillan v. German Hospital & Dispensary in the City of New York*, 100 N. Y. S. 601.

Applying the language of the preceding cases to the case it would, as was said in *Stanwood v. Clancey, supra*, have been impossible for Early not to have known of the bar's absence if he were paying the slightest attention to the situation. It was light enough to notice it, his companions noticed it and it must be that Early was guilty of that thoughtless inattention which is the very essence of negligence.

With reference to the facts and decision of the *Ballou v. Collamore case, supra*, it is to be noted that Early, without looking at the opening to see

whether his factor of protection i. e. the bar, was there, stepped or stumbled into the bay. In the Ballou case the plaintiff did not look to see if his factor of protection was there i. e. the elevator. Both acted without looking.

2. The second class of cases involved a bar or other protection which had been removed on the particular occasion.

A case which does not involve the proposition, but which is valuable under this head in amplification of the cases which are to follow, is *Donahue v. Broof*, 107 N. Y. S. 377; 122 App. Div. 552. There the deceased went out of a saloon by an unfamiliar way, stepped into an elevator shaft and was killed. The other facts, and the conclusion of the Court is found at page 378:

“But whatever may be said of defendant’s negligence, it is quite clear that the deceased was guilty of contributory negligence. He approached a door which had the appearance of being a door of an elevator, through which there was a light shining, opened the door with his head turned over his shoulder so that he could not see where he was going and stepped into the elevator shaft without looking. The slightest attention to the door before he attempted to open it, or looking after he opened the door, and before he stepped in would have apprised him of the situation and prevented the accident. Certainly nothing in the situation prevented the deceased from seeing where he was going or distracted his attention in such a way as to excuse him from looking. If the deceased had shown the slightest care in examining the door he was about to enter, either before or after he had opened it, or had

waited until he could have heard the warning of the barkeeper who was following him, the accident would have been avoided."

In the case of *Gray v. Siegel-Cooper Co.*, 79 N. Y. S. 813; 79 App. Div. 118, the plaintiff, a licensee, in the building for the first time, fell through an aperture between the elevator and the walls of the shaft. The elevator shaft had this space of ten and one-half inches due to the fact that the wall became thinner higher up in the building. The Court states at page 814:

"* * * that when they got to the fourth floor the men started to take the meat from the elevator to put it into the butcher's box; that while they were taking the meat off, the deceased was seen to step back to the rear of the elevator and fell between the wall of the elevator shaft and the elevator, from which he sustained the injuries which resulted in his death",

and on page 816 the Court states:

"There was nothing to cause deceased to fall; nothing to explain why he went to the back of the elevator. All we have is that upon this morning in a light place, with the condition that existed perfectly apparent, the deceased for some unexplained reason, without any necessity incident upon the work that he was employed to do, went to the back of the elevator and fell between the elevator and the wall"

and later on the same page:

"This elevator was not for passengers but for freight only. There was sufficient light to show that there was space between the wall and the

easterly side elevator. There was nothing to justify the plaintiff in assuming that any one thus using the elevator would step down into a hole that was perfectly apparent and which an inspection would have disclosed”.

In the case of *Amiot v. Foster*, 213 Mass. 573; 100 N. E. 1007, the Court states:

“Between the north end of the elevator and the wall was an opening $2\frac{1}{2}$ feet wide. It was down this opening that the plaintiff fell. On the elevator next to this opening was a wooden bar which could be dropped down across the end of the elevator by the person using it. It was hinged at one end to one of the posts of the elevator and when not in use stood upright against the post being held in that position by a clutch. The extent to which the bar would operate as a protection when down was in controversy by reason of the fact that a diagonal iron brace had been put on the elevator by the defendant and the end of the bar fell on that instead of into the latch originally designed for it. The end of the bar projected half or two-thirds of the way by a post on the side of the elevator where the brace was. There was evidence that, if one put his hand on the bar, when down and leaned on it, it would slip and be no protection. But there was also evidence that it ‘was a protection against any one pressing out or falling over that end that way’, as it would seem plain that it must have been. The brace with safety gates at the south end of the elevator where it was entered from the three upper floors was put on by the defendant about six months before the accident. The bar was not down when the plaintiff fell and no attempt was made by him to put it down. There was evidence tending to show that it had been used by the tenants either before or after the brace was put on. The plaintiff had

been in Mr. Dick's (a tenant of defendant) employ about 2½ years and as he testified had 'always been around this elevator during the time' that he had worked for Mr. Dick and knew of the bar and the hole at the north end of the elevator. At the time of the accident he was engaged with a truck man in loading onto the elevator at the fourth floor a panel screen of hardwood 10 or 11 feet long and 2 or 3 feet high to be taken from Mr. Dick's place to the storehouse. He was backing onto the elevator with one end of the screen and had backed, as he thought, to within 2 or 3 feet of the edge when, as he testified, 'I stubbed my heel, stepped backwards and fell right over the edge of the elevator at the north end' receiving the injuries complained of",

and on page 1008 the Court says:

"The cases of *Taylor v. Hennessey*, 200 Mass. 263; 86 N. E. 318, and *Freeman v. Hunnewell*, 163 Mass. 210; 39 N. E. 1012, would seem to go far towards disposing of this case on the ground of plaintiff's want of due care. He backed onto the elevator knowing that the hole was there and that the bar was not down. Such an accident as occurred, if not fairly to be expected as within the range of probability, was at least possible as the event has shown and he took no precaution to guard against it. It is no excuse that the bar, if down, would, or might have been a protection or that it had not been used. It was there for the express purpose of being used to prevent a person from falling over the edge of an elevator and until tried and found insufficient no one operating the elevator could neglect to use it except at his peril. If there was a slight depression or worn place in the floor of the elevator which it is difficult to see in the photographic exhibits where the plaintiff might have stubbed his heel,

more rather than less care was required of him by reason thereof. The defendant's failure to comply with the statute or to follow the directions of the inspector of buildings do not affect the question of plaintiff's due care, though bearing upon the question of the defendant's negligence".

The last case to be considered under this head is *Brudie v. Renault Freres Selling Branch Inc.*, 122 N. Y. S. 963; 138 App. Div. 112, which appellant believes involves facts very similar to those at bar. A discussion of the facts are had on page 963:

"The deceased was a truckman in employ of one P. Brady who had a contract with the defendant to cart its automobiles from the custom house to its place of business. On the day of the accident, the deceased with three other men each driving a truck loaded with an automobile arrived at the defendant's place of business. The method of unloading was to back the truck up to the curb, to let the automobile down on skids by means of a winch and to run it through an opening in the wall onto an elevator platform and then to run the elevator to the floor where it was desired to unload the automobile. It was 10 feet from the curb to the building line. The walls of the building were 2 feet thick and the elevator was 6 inches inside the wall. The elevator was 13 feet deep below the ground floor. On the inside of the wall there was a door which when pulled down completely closed the entrance to the elevator well from the street. It was the habit of the operator of the elevator to pull down the door before raising the elevator
* * * It is to be inferred that when the elevator went up the third time, the operator

did not close the door because, before the fourth truck was unloaded the deceased was observed to walk backward into the elevator shaft * * *

and on page 964:

“* * * While the plaintiff contends that there is some evidence that he slipped on the sidewalk and fell into the elevator well, the fact is that there is conjecture”

and later on page 964:

“* * * Upon very similar facts it was held in *Maxwell v. Thomas*, 31 App. Div. 546; 52 N. Y. S. 30, that on backing into an elevator well without looking to see the door was open or shut, was guilty of contributory negligence as a matter of law. That case was more favorable to the plaintiff in that it appeared that the plaintiff was attempting to put a skid in place and this may have had his attention for the moment diverted from the fact that he was near an opening into an elevator well”.

The first case under this heading *Donahue v. Broof* brings out the necessity of an individual using his senses. The only conditions of observability considered were the facts that it was light, that there was no interference with a view, and nothing to distract plaintiff's attention and the Court held the plaintiff was guilty of contributory negligence, because he approached a door having the appearance of an elevator door without looking. The case does not parallel the present case inasmuch as, among other differences, plaintiff was not familiar with the premises; but the case is val-

uable as bringing out the duty of a plaintiff to use his senses.

In the second case, *Gray v. Siegel-Cooper Co.*, the plaintiff was also unfamiliar with the premises, but the case is nearer the one now under consideration. The factors of observability were that the unguarded opening was perfectly apparent and it was light.

In the third case, *Amiot v. Foster*, the situation still more closely parallels the present one. There was a wooden bar which had been placed across one end of the elevator for the protection of passengers. The plaintiff, familiar as he was with the surroundings and knowing the protection the bar afforded in place, backed into the opening which he knew was there. In the present case Early knew or should have known by a proper use of his senses that the bar was not there. He certainly knew that beyond that doorway lay danger and with this knowledge, actual or imputed to him, Early turned his back to where the danger was and fell overboard.

The fourth case, *Brudie v. Renault Freres Selling Branch Inc.*, is remarkably like this Early case. It was customary in both the Brudie case and the Early case to have a protection across an opening when the opening would, without this protection, have been dangerous. The dangerous element in one case is the elevator shaft, in the other, the waters of the bay. In each case the protection

was not put up, and in each case the deceased backed into the open space, in one case by walking, in the Early case perhaps by leaning. In both cases there seems to be contributory negligence.

3. A California elevator case.

There is one California case which appellant desires to call to the Court's attention. In the case of *Kauffman v. Machin Shirt Co.*, 167 Cal. 506, the facts were that the deceased, a boy of fifteen years, used an elevator to deliver a package on the fourth floor of a building. He found the elevator shaft door unfastened, opened it about a foot and walked a short distance on the fourth floor to deliver the package. The door was, to all appearances the same as when he left it. Someone had moved the elevator, however, and Kauffman believing it was there, stepped in to the shaft and falling to the basement died from injuries received. It appeared that the elevator was not maintained in conformity with city ordinances. Paralleling these facts with the present case the Court's attention is called to the fact that Early was twenty years of age, and had for five years been an employee of a lumber mill (Apostles, p. 79); that he watched the opening of the door and when it became stuck he assisted in completing the operation (Apostles, pp. 122, 102, 146); that it was not dark (Apostles, pp. 182, 152); that there was enough light to see that the bar was gone (Apostles, p. 152), and the bar was, when in place, three feet

from the ground, seven or eight feet long (Apostles, p. 82) and five or six inches wide (Apostles, p. 116); and also that the other witnesses knew the bar was not in place (Apostles, pp. 106, 131, 152, 141). In the Kauffman case the protection was the elevator itself and the danger the open shaft; in the Early case the protection was the bar and the danger was the bay. The Court, after disposing of the question of failure to comply with elevator ordinances as not being the proximate cause of the accident, states at page 510:

“Nor is the situation helped by the allegation that when he returned the elevator and shaft were to all appearances in the same condition in which he left them. There is no statement that he looked or that if he had looked there was any physical reason why he could not have seen that the elevator had been moved. In the absence of any such showing the court must assume that ‘to look was to see’ and that if he had looked he must have noticed the danger. One may not thus heedlessly disregard the commonest precautions for his own safety. (Green v. Southern Pacific Co., 132 Cal. 254; 64 Pac. 255; Hamlin v. Pacific Electric Ry Co., 150 Cal. 777; 80 Pac. 1109; Brown v. Pacific Electric Ry. Co., ante, p. 200; 138 Pac. 1005. It is true that ordinarily the question of contributory negligence is one largely of fact for the consideration of the jury, but where the standard of conduct required of persons under given circumstances has been plainly neglected by the person seeking relief, it then becomes a question of law. (Hamlin v. Pacific Electric Ry Co., 150 Cal. 777; 89 Pac. 1109, and Brown v.

Pacific Electric Ry. Co. ante, p. 200; 138 Pac. 1005.)”

And on page 512 the Court concludes:

“But whether we regard the decedent under the facts pleaded as a mere licensee or as a person using the elevator by invitation of the defendants, we cannot say that he was excused for his failure to observe the absence of the elevator when he returned to the open door of the shaft.”

In conclusion it may be stated that the following factors of observability were present in the Early case:

1. It was not dark though not wholly light. One could see the bar (*Whelan v. Gas Light Co., supra*).

2. The factor whose absence caused the accident was large and situated well within easy vision without looking at one's feet (*Quirk v. Siegel-Cooper Company, supra*).

3. The absence of the bar could easily have been seen if Early had looked (*Day v. Cleveland C. C. & Lt. L. R. Co., supra*) or if he had paid the slightest attention (*Ballou v. Collamore*).

4. There was nothing to obscure Early's vision (*Whalen v. Gas Light Co., supra*).

5. Early first approached doorway after observing his companions partially open the door.

6. Early shoved on the door near the point where the bar would be if up.

7. Nothing distracted Early's attention any more than deceased's attention was distracted in the *Donahue v. Broof* case.

8. The opening was perfectly apparent (*Gray v. Siegel-Cooper Co., supra*).

9. Early's companions all saw that the bar was down (*Sparks v. Siebrecht, supra*).

10. Early approached a doorway leading to a dangerous place with his back to it on an occasion where the protection usually present was not up, and failed to look (*Brudie v. Renault Freres Selling Branch Inc., supra*).

11. There is no statement that he (Early) looked or if he had looked there was any physical reason why he could not have seen that the bar had been moved. In the absence of any such showing the Court must assume that "to look was to see" and that if he had looked he must have noticed the danger (*Kauffman v. Machin Shirt Co., supra*).

In the cases considered it appeared in some that plaintiff was not familiar with the premises. That this is an item which charges the plaintiff with knowledge of the danger was held in the case of *Gilfillan v. German Hospital and Dispensary etc.*, 100 N. Y. 601, cited *supra*.

In the case of *Larned v. Vanderlinde*, 165 Mich. 464; 131 N. W. 165, the Court in determining plaintiff guilty of contributory negligence states at page 169:

“The only legitimate questions upon this record are whether this defendant was negligent for not lighting or barring the stairs by reason of darkness and whether the plaintiff was herself negligent. The plaintiff has failed to make a *prima facie* case upon the first and has pretty clearly established the second proposition. The opening railings, newel posts and elevator were in plain sight, and though she walked directly toward them, she was oblivious to their presence. There is no opportunity for any other inference from the testimony.”

In this case the opening, the side posts of the door, and the absence of the bar were plainly apparent. Was not Early guilty of contributory negligence?

Conclusion.

The appellant believes that it has proven to this Court:

1. That it was entitled to judgment on the pleadings.
2. That its negligence was not the proximate cause of Early's death.
3. That the death of Early was caused by the negligence of Early or his companions.
4. That Early was guilty of contributory negligence.

In regard to the third point it is again called to the Court's attention that Moss and Whelihan, who

opened the door saw the bar was not there and failed to notify Early.

Dated, Eureka,
October 4, 1917.

Respectfully submitted,

CLARENCE COONAN,

NAT SCHMULOWITZ,

Proctors for Appellant.

No. 2975

In The

United States Circuit Court of Appeals

For the Ninth Circuit

2

COGGESHALL LAUNCH COMPANY
(a corporation)

Appellant,

VS.

ELIZA A. EARLY, claimant,

Appellee.

REPLY BRIEF FOR APPELLEE.

W. ERNEST DICKSON,

Proctor for Appellee.

Filled this day of October, 1917.

FRANK D. MONCKTON, Clerk.

By

Deputy Clerk.

No. 2975

In The

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(a corporation)

Appellant,

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Appellee.

CLAIMANT'S AND APPELLEE'S REPLY BRIEF.

THE RECORD.

The apostles on appeal show the following matters of record. On March 19th, 1915, the petitioner and appellant filed its petition for limitation of liability. (Trans. pages 6 to -6). That after due proceedings had been taken the Hon. District Court issued its orders for a monition. (Trans. pages 30 to 32). And on June 28th, 1915, such monition was issued (Trans. pages 37 to 40), and on the same day on application therefor the court issued its restraining order, restraining the claimant, ELIZA A. EARLY, and her attorney from prosecuting her claim in the

Superior Court of Humboldt County, California. (Trans. pages 43 to 46). That thereafter, and within the time allowed by law and the court, the claimant, Eliza A. Early, to wit, July 19th, 1915, filed her answer in due form of law to the said Petition for Limitation of Liability (Trans. pages 47 to 53); and the day before filing her answer, to wit, July 18th, 1915, she had filed her claim which appears on pages 328 to 335 of the Transcript.

It will readily be observed that the answer and claim are in due form.

“In admiralty the parties are not held
“to great nicety in pleadings, and where the
“libel states facts which warrant a recovery,
“and the real issues are tried, a recovery will not be denied because the libel
“counts on the breach of a charter which
was not binding on respondent.”

W. S. Keyser & Co. vs. Jurvelius, 122 Fed.
218, 58 C. C. A. 664.

The form of the answer and claim in the case at bar is found approved in a like cause in this Honorable Court. We cite the Court to the cause of Humboldt etc. vs. Christopherson, 73 Fed. Rep. 339, where the cause of action arose almost in the same waters.

In case at bar no exceptions were made to either the answer or claim, nor was there any demurrer interposed. The cause came on regularly for trial, and was heard in open court. The testimony of the wit-

nesses and evidence taken is found in the Transcript on pages 56 to 275. The minute order awarding damages on page 276, the opinion of the Court on pages 277 to 286, the minute order for decree on pages 286 to 287, the order for decree on page 287, the final decree on pages 288 to 299, and the Assignment of Errors on pages 302 to 306 of the Transcript.

ARGUMENT.

WE WILL PRESENT OUR ARGUMENT IN THE
FOLLOWING ORDER.

- 1st. THE DISCUSSION OF THE SUFFICIENCY OF APPELLANT'S ASSIGNMENTS OF ERRORS.
- 2nd. THE JURISDICTION OF THE COURT.
- 3rd. WAS APPELLANT A COMMON CARRIER.
- 4th. THE LIABILITY OF APPELLANT AS A COMMON CARRIER.
- 5th. THE TENTH ASSIGNMENT OF ERROR.
- 6th. THE ELEVENTH ASSIGNMENT OF ERROR.
- 7th. THE TWELFTH ASSIGNMENT OF ERROR.
- 8th. THE THIRTEENTH ASSIGNMENT OF ERROR.

- 9th. THE FOURTEENTH ASSIGNMENT OF ERROR.
- 10th. THE FIFTEENTH ASSIGNMENT OF ERROR.
- 11th. THE SIXTEENTH ASSIGNMENT OF ERROR.
- 12th. THE SEVENTEENTH ASSIGNMENT OF ERROR.
- 13th. THE EIGHTEENTH ASSIGNMENT OF ERROR.
- 14th. THE REPLY TO APPELLANT'S CONTENTION OF ITS NON-LIABILITY.

1st. SUBDIVISION.

THE DISCUSSION OF THE SUFFICIENCY OF APPELLANT'S ASSIGNMENTS OF ERRORS.

We urge that the 1st, 2nd, 3rd, and 4th assignments of error are too general.

The Natches, 78 Fed. 183, 24 C. C. A. 49.

“An assignment “that the court erred
“ “in holding that libellant was entitled to
“ “any compensation for the injuries re-
“ “ceived” by him is too general.”

Lafourche vs. Henderson, 94 Fed. 871.
36 C. C. A. 519.

2nd. SUBDIVISION.

THE JURISDICTION OF THE COURT.

We deem it incumbent on claimant to state the law applicable to claims like the one at bar.

Section 376 and 377 of the Code of Civil Procedure of the State of California reads as follows:

“When the death of a person not being
“a minor is caused by the wrongful act or
“neglect of another, his heirs or personal
“representatives may maintain an action
“for damages against the person causing
“the death, or if such persons be employed
“by another person who is responsible for
“his conduct, then also against such other
“person. In every action under this and
“the preceding section, such damages may
“be given as under all the circumstances of
“the case may be just.” (Sec. 376).

“A father, or in case of his death or de-
“sertion of his family, the mother, may
“maintain an action for the injury or death
“of a minor child, and a guardian for the
“injury or death of his ward, when such in-
“jury or death is caused by the wrongful
“act or neglect of another. Such action
“may be maintained against the person
“who is responsible for his conduct, also
“against such other person.” (Sec. 377).

George D. Early, the minor son of Claimant, and for whose death damages are claimed, lost his life in Humboldt Bay, within the boundaries of Hum-

Humboldt County, State of California. (See Trans. pages 112, 113, 114, 127, 128, 149, 159, 160, 161, 162, 166). It is a fact not disputed.

“The laws of a state may create a liability in a marine cause arising on the high seas within its boundaries.”

145 U. S. 335.

36 L. Ed. 727.

“The District Court of the United States has jurisdiction in admiralty to give damages for loss of life, where the statute of a state in which the accident occurred gives the right of action for such loss.”

The Harrisburg, 119 U. S. 199.

30 L. Ed. 358.

The E. B. Ward, 17 Fed. 456.

The Highland Light, Fed. Cases No. 6,477.

The Sea Gull, Fed. Cases No. 12,578.

The Garland, 5 Fed. Rep. 924.

Holmes vs. Oregon, 5 Fed. Rep. 524.

The Cephalonia, 29 Fed. Rep. 332.

32 Fed. Rep. 112.

The City of Norwalk, 55 Fed. Rep. 99.

The St. Nicholas, 49 Fed. Rep. 671.

The Oregon, 45 Fed. Rep. 62.

The Clatsop Chief, 8 Fed. Rep. 163.

The Columbia, 27 Fed. Rep. 704.

Grimsley vs. Hawkins, 46 Fed. Rep. 400.

Humboldt etc. vs. Christoperson, 73 Fed. Rep. 239.

3rd. SUBDIVISION.

WAS APPELLANT A COMMON CARRIER.

Query. Was the Appellant a Common Carrier? It is admitted that the appellant was a public ferryman, operating a steam ferryboat (The Antelope) on Humboldt Bay in the County of Humboldt, State of California. From an early date it was held by the Courts that ferrymen were common carriers.

Babcock vs. Herbert, 3 Ala. 392.

37 Am. Dec. 695.

Fisher vs. Clisbee, 12 Ill. 344.

Powell vs. Mills, 37 Miss. 691.

Sanders vs. Young, 73 Am. Dec. 175.

In *Wilson v. Hamilton*, 4 Ohio St. 722, the court, by Ranney, J., said: "We have been wholly unsuccessful, after very careful research, in finding where it was even doubted that a ferryman, occupying a position in a line of public travel, and holding himself out for general employment, was not a common carrier, and, as such, subject to all the liabilities incident to that position. That he is such is unqualifiedly asserted by the best text-writers, and enforced in a large number of decided cases. Angell on Carriers, Sections 82, 130; Story on Bailm., Sec. 496; 2 Kent's Com. 599; *Smith v. Seward*, 3 Pa. St. 342; *Pomeroy v. Donaldson*, 5 Mo. 36; *Cohen v. Hume*, 1 McCord L. (S. Car.)

444; Rutherford v. M'Gowen, 1 Nott & M. (S. Car.) 19; Garner v. Greene, 8 Ala. 96; Trent v. Cartersville Bridge Co., 11 Leigh (Va.) 544; Fisher v. Clisbee, 12 Ill. 344; Walker v. Jackson, 10 M. & W. 161.”

“The law regards ferrymen as common carriers, and has imposed upon them the same duties and liabilities.”

May vs. Hanson, 5 Cal 360.

Griffith vs. Cave, 22 Cal. 534.

Slimmer vs. Merry, 23 Iowa, 94.

Chevallier vs. Straham, 47 Am. Dec. 653.

Liverpool S. Co. vs. Phoenix Co., 129 U. S. 439.

32 L. Ed. 791.

The Montana, 22 Fed. 727.

Moses vs. Hamburg American S. Co., 88 Fed. 330.

Delaware Etc. vs. Ashley, 67 Fed. 212.

The City of Panama, 101 U. S. 462.

“A ferryman becomes liable as soon as “he signifies his assent or readiness to receive the passenger, or has accepted and “received the property for carriage.”

May vs. Hanson, 5 Cal. 360.

Griffith vs. Cave, 22 Cal. 535.

4th. SUBDIVISION.

THE LIABILITY OF APPELLANT AS A COMMON CARRIER.

“Public ferrymen are common carriers, and liable not only for gross negligence but for all losses except such as are occasioned by the act of the person employing them, the act of God, and the enemies of the country.”

May vs. Hanson, 5 Cal. 360.

Cohen vs. Hume, 1 McCord 444.

Pomeroy vs. Donaldson, 5 Mo. 36.

Babcock vs. Herbert, 3 La. 392.

Fether vs. Clisble, 12 Ill. 344.

Slimmer vs. Merry, 23 Iowa 90.

Wilson vs. Hamilton, 4 Ohio St. 722.

Smith vs. Stewart, 3 Pa. St. 342.

Albright vs. Penn. 14 Tex. 290.

“A common carrier of passengers by water is bound to use the utmost care consistent with the nature and extent of their business to guard against injury to passengers.”

Simmons vs. Bedford B. & N. S. Co.,
97 Mass. 361.

“Common carriers of passengers by water are bound to use the highest degree of care in reference to each particular with reasonable regard to the nature of the undertaking.”

Dodge vs. Boston & B. S. Co., 148 Mass.
207.

12 Am. St. Rep. 541.

2 L. R. A. 833.

“A common carrier of passengers is bound to exercise the highest care, skill and foresight conducive to the passenger’s safety and capable of being put into practice.”

Illinois C. R. Co., vs. Huhn, 177 Tenn.,
106.

64 S. W. 202.

“Passengers carriers bind themselves to carry safely as far as human care can go; and are responsible for the slightest negligence.”

Leslie vs. Wabash Etc. R. C., 88 Mo. 50.

“A carrier is bound to exercise the highest degree of care and skill to preserve the safety of passengers and prevent accidents; reasonable or ordinary diligence is not sufficient.”

Moore vs. Des Moines & Ft. D. R. Co.,
69 Iowa 491.

“Where carriers undertake to convey passengers by the powerful and dangerous agency of steam, public policy and safety require that they should be held to the greatest possible care and diligence.”

New York C. T. R. Co. vs. Lockwood,
84 U. S. 357.

21 L. Ed. 627.

“Any negligence in such a case may well deserve the epithet of gross.”

Phila. & R. R. Co. vs. Derby, 55 U. S. 46.
14 L. Ed. 502.

Penn. Co. vs. Roy, 102 U. S. 455—26
L. Ed. 144.

The John G. Stearns, 170, U. S. 125—
42 L. Ed. 974.

“The law requires the carrier to use the highest care, diligence and skill known to careful, diligent, and skillful carriers.”

Montgomery and E. R. Co. vs. Mallette,
92 Ala. 215.

9 So. 363.

C. T. of G. R. Co. vs. Johnston, 106 Ga.
136.

32 S. E. 78.

Alabama G. S. R. Co. vs. Hill, 93 Ala.
521.

30 Am. St. Rep. 65.

“Where a libel was filed, claiming compensation for injuries sustained by a passenger in a steamboat, proceeding from Sacramento to San Francisco, in California, the case is within the admiralty jurisdiction of the Courts of the United States.

“The principal asserted in 14 How, 486, re-affirmed, namely: when carriers undertake to convey persons by the agency of steam, public policy and safety require that they should be held to the greatest possible care and diligence.”

The S. New World vs. King, 57 U. S.
469.
14 L. Ed. 1019.

5th. SUBDIVISION.

THE TENTH ASSIGNMENT OF ERROR.

In discussing the tenth assignment of error it will also be necessary at the same time to take up and discuss the nine assignments preceding the tenth, in order to make a logical discussion of the whole case. Therefore we will dispose of the tenth assignment before going into the meat of the case presented by the appeal.

The 10th assignment of error is that

“The said District Court error in finding that the petitioner Coggeshall Launch Company was negligent in failing to put up a bar across a cargo port door and therefore rendering judgment in favor of said claimant.”

In this behalf, claimant urges that it was the duty of appellant to keep the bar in place. It was a duty that could not be delegated to another. It was a requirement of the constituted authorities.

We quote from the testimony of Walter Coggeshall, president of appellant.

Q. “What was the custom and practice of the Coggeshall Launch Company in regard to protecting the doorway, when open?”

Ans. “Why, this custom was brought about
“through an order of the United States Inspec-
“tion Service. The Inspectors came here some
“five years ago and said: ‘Now, do you ever
“open that door?’ I said that I did. They said
“‘If that is the case’—The instructions laid
“down were—the regulation to us—the inspec-
“tor said, ‘You will have to put a bar across
“this door to have in case this cargo-port is
“open, and we would advise you to have a bar
“made and put across here, and it may be
“locked.’ I said ‘All right, I will do so.’

“I followed the orders of the Steamboat
“Inspection Service.

“The orders that I gave to the captain of
“the boat and that he should transmit to the
“crew were that under no circumstances should
“that door ever be open unless at the time it
“was open the bar should be safely in its place;”

(See testimony of Walter Coggeshall pages
174 to 175 of the Transcript). The same witness
commencing on page 177 of the Transcript.

“But if we did elect to open the cargo port
“for ventilation or for other purposes, then they
“must have a bar to take its place. Further-
“more, from this moment that I got the instruc-
“tion from the steamboat inspectors I had that
“bar made, and I notified my master, I notified
“him personally, and I know he notified the
“crew, and I notified them—my instruction was
“that a failure to conform with the orders of the
“officers of the Steamboat Inspection Service
“would result in discharge on my part, as it was
“a very important matter and to my knowledge
“that order was issued and was never violated

“by one of these men. If they opened the door
“they never failed to put that bar in place.”

Then again on page 178 of the Transcript
the witness testifies:

“The bar is simply fastened with a pin. By
“the word ‘lock’ that does not mean as you
“would put a padlock on it; it simply means a
“pin right through. There were many accidents
“resulting years ago and they were ordered to
“put bars on steamers, and later, when a man
“went overboard, as the result of that accident
“the law requires that all bars must be locked
“with a key.”

LIABILITY IMPOSED BY FAILURE TO PUT THE BAR IN PLACE.

Under the above heading I shall discuss three
questions. Viz.

A. Did the petitioners owe to their passen-
gers the duty of putting the bar in place notwith-
standing the fact that the door was closed.

B. Was the failure to put the bar in place the
proximate cause of the injury.

C. The known custom of passengers to open the
door.

1. How it affects the question of legal lia-
bility.
2. What was the legal effect if done con-
trary to orders.

We call the court’s attention to the findings of
the Honorable District Court, on this particular

question in controversy appearing on pages 295 and 296 of the Trans., viz;

“That it was gross negligence on the
“part of petitioner, Coggeshall Launch
“Company, to leave the dock, on the said
“voyage and evening hereinbefore found,
“with an opening of six or eight feet wide,
“such as was the said cargo-port door lead-
“ing directly to the water, and with the said
“lower deck of said ferryboat crowded with
“passengers, and without the said protect-
“ing bar across said cargo-port doorway;
“and that it was the duty of the said oper-
“ators of the said vessel to have the said bar
“in place across the said (243) cargo-port
“opening.”

“That the said George D. Early, now
“deceased, did not open the door at the place
“where he fell through, and he did not con-
“tribute in any degree to the lack of pro-
“tection at said place on said ferry-boat
“‘Antelope’ occasioned by the absence of
“the said bar.

“That at the time the said George D.
“Early, now deceased, fell into the waters
“of Humboldt Bay and was drowned, as
“hereinbefore found, it was between five
“thirty and six o’clock in the evening of
“January 15th, 1015, and while not yet
“quite dark, it was not however, wholly
“light.

“That in operating the said steam fer-
“ry-boat ‘Antelope’ on the voyage, day and
“evening hereinbefore found, one man short
“contrary to the requirements of law, re-

“sulting in the fact that the bar across the
“said cargo-port door opening was not in
“place; leaving the dock at Samoa without
“having the said bar in place across the
“said cargo-port opening some six or eight
“feet wide, leading directly to the water,
“on said lower deck of said ferry-boat then
“filled with passengers, under the then ex-
“isting and prevailing conditions, the said
“petitioner, Coggeshall Launch Company,
“and its said steam ferry-boat ‘Antelope’
“was guilty of gross and inexcusable care-
“lessness and negligence, and her said pas-
“senger George D. Early was drowned by
“reason of said carelessness and negli-
“gence.”

The question presented to this Honorable Circuit Court of Appeals is, whether or not this finding of the District Court is supported by the evidence.

“A finding of fact by the District Judge
“in an admiralty suit, based upon testimony
“taken in open court, should be accepted by
“the appellate court, unless the evidence
“clearly preponderates against it.”

Erie etc. vs. Dunseith, 239 Fed. 814.

“This conclusion of the District Judge
“that the steamer was so in fault, reached
“after the hearing of the character stated,
“should be accepted by us, unless the evi-
“dence clearly preponderates against it.”

City of Cleveland vs. Chrisholm, 90
Fed. 157.

33 C. C. A. 157.

Monongohela etc. vs. Hurst, 200 Fed.
711.

119 C. C. A. 127.

Pugh vs. Snodgrass, 209 Fed. 325.

126 C. C. A. 251.

“The well settled rule, which has been
“followed by this and other courts, that in
“case on appeal in admiralty, when ques-
“tions of fact are dependent upon conflict-
“ing testimony, the decision of the District
“Judge, who had the opportunity to see the
“witnesses and judge of their appearance,
“manner, and credibility, will not be re-
“versed, unless it clearly appears to be
“against the weight of the evidence.”

The Hardy, 229 Fed. 985.

The Alijandro, 56 Fed. 621.

6 C. C. A. 54.

Perriam vs. Pac. C. Co., 133 Fed. 140.

66 C. C. A. 206.

Peterson vs. Larsen, 177 Fed. 617.

101 C. C. A. 243.

Before further discussion, we wish to call the
attention of this Honorable Court to the findings of
fact the Hon. District Court immediately preceding
the aforesaid quoted portion of the findings, found
on pages 290, 291, 292, and 293 of the Transcript,
viz:

“That at all times mentioned in said
“petition, and the claim and answer thereto
“and herein, the said ferry-boat ‘Antelope’
“was run and operated by the petitioner,
“Coggeshall Launch Company, who had
“possession of said ferry-boat ‘Antelope’

“under a contract of purchase from the petitioner, Hammond Lumber Company; “that the passengers of said ferry-boat “‘Antelope’ consisted for the most part of “workmen going back and forth from their “homes in Eureka to their work across “Humboldt Bay at the Samoa mill, and for “that reason the passenger list on said ferry-boat ‘Antelope’ remained practically “the same. That a large number of these “men were regularly carried on the freight “deck, that is to say, the lower of the two “decks of said ferry-boat. That this said “lower deck was almost on a level with the “surface of the water, and wholly enclosed; “that on the starboard side, through this “enclosure, there is a doorway six or eight “feet wide, known as the cargo port, “through which it was the custom of petitioners on the Samoa side of Humboldt Bay to take on both passengers and “freight. That this doorway was closed by “a sliding door, which was opened by sliding it aft. That when this door was open “and the vessel away from the dock, the “open doorway led right out to the water, “and there was nothing to prevent a passenger from falling or walking directly “through it into the water. That as a protection to the passengers on the said lower “deck, the United States Inspector ordered that a bar about six inches in width, “when in place, extend across the said port “opening at a height of between three and “four feet. That it was the invariable practice of the vessel to have the said bar in “place during the trips of said vessel across “the said Humboldt Bay whether the said “door was opened or closed at the time of “leaving the dock. (240).

“That at the time mentioned in the said

“petition, claim and answer, the said ferry-boat ‘Antelope’ was required by law, as
“appearel from her Certificate of Inspection, to carry as her complement of officers and crew, one licensed master and pilot, two deck-hands, one licensed chief engineer and one fireman.

“That on the evening of January 15th, 1915, and for nine days prior thereto, the said ferry-boat ‘Antelope’ had been running and operated short-handed by reason of one of her deck-hands, named Nick, being sick in the hospital.

“That on the evening of January 15th, 1915, at about 5:30 P. M. the said ferry-boat ‘Antelope’ started on her regular voyage from Samoa to Eureka without having in place the aforesaid mentioned bar, which was usually placed across the cargo-port doorway to protect passengers from the danger of falling through said opening into the water. That on this particular evening and voyage, to wit, on January 15th, 1915, the said deck-hand Nick was absent as hereinbefore found, and the deck-hand Andrew was engaged in taking tickets, and that the said deck-hand Andrew neither closed the said cargo-port door nor put the said bar across the doorway, and that the said bar was not in place; and in fact the said bar was not put up at all on this particular voyage and evening.

“That at the time of the sailing of said steam ferry-boat ‘Antelope’ as hereinbefore found, before leaving the dock at Samoa, the said cargo-port door on the said lower deck was not closed by the officers or crew of said vessel, and although the said bar was not put up at all during that voyage and evening, but the said door was closed before said vessel left Samoa by

“one of the passengers on the said lower
“deck.

“That the said cargo-port door was in-
“variably opened by some one of the pas-
“sengers before reaching the Eureka Dock,
“usually being opened when the landing
“whistle was blown. That immediately
“(241) upon the blowing of the whistle, on
“said steam ferry-boat ‘Antelope,’ for land-
“ing and while still in the open waters of
“the bay at some distance from the dock,
“some passenger or other would open the
“said cargo-port sliding door. That the
“said opening of the said cargo-port door
“was not a casual occurrence, nor even
“merely a frequent occurrence, but was an
“invariable custom that had been in vogue
“for a number of years. This custom of so
“opening the said cargo-port door was well
“known to all the officers and employees of
“said steam ferry-boat ‘Antelope,’ and was
“also known to Captain Walter Coggeshall,
“the president of petitioner, Coggeshall
“Launch Company.”

The evidence fully supports the foregoing findings of the Hon. District Court. The more material findings as aforesaid are not disputed, and the remainder are fully supported by a preponderance of the evidence. The most that can be said in behalf of the Appellant is, that in some instances the evidence is conflicting. The great weight of the evidence sustains the findings appealed from. See the testimony of WILLIAM EARLY, on pages 80 to 87, 169 to 171, and 271 to 272; JOSEPH WHELIHAN on pages 118 to 137 171 to 172; ALVA MOSS on pages 92 to 118, and 172 to 173; OTTO JOHN-

SO Non pages 138 to 145; and EMMETT WHELIHAN on pages 145 to 157.

This Honorable Court has laid down the hard and fast rule, that is

“The well settled rule is applicable
“that the findings of fact of the trial court
“will not be disturbed in this court unless it
“clearly appears that there was error.”

Whitney vs. Olsen, 108 Fed. Rep. 292.
47 C. C. A. 331.

Perriam vs. Pac. Coast Co., 133 Fed.
Rep. 140.
66 C. C. A. 20c.

The Bailey Gatzert, 179 Fed. Rep. 44.
102 C. C. A. 612.

The Transcript presents a clean record devoid of error. At least diligent perusal of the same by counsel for appellee has failed to unearth a single material error. The most that can be said in behalf of the Appellant is, that in some instances there is a conflict of evidence; but there is no instance but in which the preponderance of the evidence supports the findings of the Hon. District Court. On conflicting evidence this Hon. Court has laid down the rule that

“A finding of fact made by a court of
“admiralty on conflicting evidence is pre-
“sumptively correct, and will not be re-
“versed by the appellate court, unless the
“record clearly shows by the weight of the
“evidence that it is erroneous.”

Louisiana etc. vs. Gidionsen, 217 Fed.
Rep. 75.
133 C. C. A. 445.

The Elenore, 217 Fed. Rep. 753.

133 C. C. A. 447.

In the Samson, 217 Fed. Rep. at page 347—The court says:

“Out of the great mass of conflicting
“testimony with respect to the maneuvers
“of the respective vessels prior to the col-
“lision, and the positions of the various
“tows thereafter, the learned judge of the
“court below found that the point of col-
“lision was well to the Oregon side of the
“channel, and concluded that the fault was
“with the Samson. This finding under well
“settled rules of appellate procedure,
“should not be disturbed.”

Spencer vs. Dalles etc., 188.

Fed. Rep. 865, 868, 100 C. C. A. 499.

It was the legal duty of petitioner to place a barrier across the opening of the cargo port.

Hanley vs. Eastern S. S. Co., 109 N. E.
167.

Peverly vs. Boston, 136 Mass. 336.

Sturgis vs. Kountz, 165 Pa. St. 358.

Clark vs. Union Ferry Co., 35 N. Y. 485.

Wycoff vs. Queens etc., 52 N. Y., 32.

Lewis vs. Smith, 107 Mass. 334.

Ferris vs. Union Ferry Co., 36 N. Y.
312.

It does not require any wonderful reasoning power to perceive that if the door were closed and *remained closed* the bar would be unnecessary; neither does it require any wonderful reasoning power to perceive that if the door were open *or apt to*

be opened, the bar would be very essential to the safety of the passengers.

Counsel may argue that because the door was closed the bar was unnecessary, and if the passengers saw fit to open the door they either assumed the risk or they were guilty of contributory negligence. The argument is fallacious.

Negligence is never absolute. It is always relative and must always be considered in the light of surrounding conditions and circumstances. It is not a question of whether or not the passengers were safe before leaving the Samoa side. It is a question of whether or not they were safe all the way across. The carrier owes to its passengers a very high degree care, and it is the duty of the carrier to see that its passengers are carried in safety, and landed in safety at the termination of the voyage.

The question presented here is; not what were conditions when they left Samoa, but what ought reasonably to have been foreseen.

We may at the outset ask: "If the door is sufficient protection to the passengers why did the company have a bar"? The answer is, that the bar is there or ought to be there for protection, when the door is open. The fact that there is a bar, shows that the company, and the legal constituted authority, recognizes the fact that the door was apt to be opened. The fact that they *frequently* (according to our witnesses *always*) had the bar up even when the door was closed, shows that they recognize and frequently guarded against the door being opened. The

fact that it was the invariable rule for the passengers to open the door and that the company knew it, shows that the company could not have depended upon the door alone as a protection, or if they did that in itself would constitute negligence. If then, they knew and recognized the fact that the door would in all human probabilities be opened, how can it be argued that it would be anything short of gross negligence to leave the bar down even though the door were closed. It certainly falls far short of that high degree of care which the law demands of a carrier for the safety of its passengers.

We can here invoke the doctrine of RES IPSA LOQUITUR which is well stated in RULING CASE LAW VOL. 5 Par. 713 in the following language:

“In accordance with doctrine of Res Ipsa Loquitur it is usually held that where an accident to a passenger, who is himself without fault, is caused by a defect in any of those things which the carrier is bound to supply, or is the result of a failure in respect of the carriers means of transportation or the conduct of its servants therewith, a presumption of negligence arises as against the carrier, and where one suing a carrier for injury shows that his injury was thus caused, he makes out a prima facie case for the recovery of damages (Longline of cases here cited). In other words, where a person suing a carrier of passengers for injury, shows that his injury happened to him without fault or negligence on his part, he makes out a prima facie case for the recovery of damages. It then devolves upon defendant carrier to show the absence of any negligence on the part of itself or its

agents whereby the accident happened. (Citing a long line of cases among them *Treadwell vs. Whittier* 80 Cal. 574; *Bonneau vs. The North Shore Railroad Co.* 152 Cal. 456, same case 125 A. S. R. 68 and note: *LeBarron vs. East Boston Ferry Co.* 87 Am. Dec. 717 also note 62 Am. Dec. 679.”

The reasons assigned for the doctrine of *Res Ipsa Loquitur* (1) the contractual relation between the passenger and the carrier by which it is incumbent on the carrier to transport with safety; hence the burden; (2) The cause of the accident, if not exclusively in the knowledge of the carrier, is usually better known to the carrier, and this superior knowledge makes it just that the carrier should explain. (3) Injury to a passenger by a carrier is something that does not usually happen when the carrier is exercising due care; hence the fact of injury affords a presumption that such care is wanting. (Line of cases cited 5 Ruling Case Law, Page 77).

A case in point is *Hooper vs. Denver & R. G. R. Co.* 155 Fed. 273.

This was a case for death caused by the alleged negligence of defendant Ry. Co. The action was brought under a Colorado Statute which declares that in an action for death caused by a public carrier it shall forfeit for every person and passenger so injured or killed not more than \$5,000.00 nor less than \$3,000.00. In the case some question was raised as to the sufficiency to the evidence of negligence on defendant's part. The court held that the case was brought within the rule laid down by the Supreme

Court in *Gleeson vs. Virginia Milan Co. Ry. Co.* (140 U. S. 425) as follows:

“That the happening of an injurious
“accident is in passenger cases *prima facie*
“evidence of negligence on the part of the
“carrier, and that (the passenger being
“himself in the exercise of due care) the
“burden then rests upon the carrier to
“show that its whole duty was performed
“and that the injury was unavoidable by
“human foresight.—The law is that the
“plaintiff must show negligence in the de-
“fendant. This is done *prima facie* by
“showing, if the plaintiff be a passenger,
“that the accident occurred.”

See also *North Jersey St. Ry. Co. vs. Purdy* 143 Fed. 955; *Island & Seaboard Coasting Co. vs. Tolson* 139 U. S. 551, 35 L. Ed. 270, cases there cited. *Southern Pacific Ry. Co. vs. Garvin* 144 Fed. 348.

The District Court has found, and the Appellate Court will undoubtedly hold, that the failure to put the bar in place was an act of negligence on the carrier's part, in view of all the circumstances, and that a duty devolved upon them to protect the doorway with the bar, even though the door was closed when the “Antelope” left Samoa.

**B. WAS THE NEGLIGENT ACT IN FAIL-
ING TO PLACE THE BAR, THE PROX-
IMATE CAUSE OF THE INJURY.**

We wish to call the Court's attention to the findings of the lower court on this question and refer the Court to page 291 of the transcript where this language is used:

“That the doorway was closed by a
“sliding door, which was opened by sliding
“it aft. That when this door was open and
“the vessel away from the dock, the open
“doorway led right out to the water, and
“there was nothing to prevent a passenger
“from falling or walking directly through
“it into the water. That as a protection to
“the passengers on the said lower deck the
“United States Inspector ordered that a
“bar about six inches in width, when in
“place, extend across said port opening at
“a height of between three and four feet.”

And again at page 296: “And leaving
“the dock at Samoa without *having the bar*
“*in place* across said cargo port opening
“some six or eight feet wide leading direct-
“ly to the water, on said lower deck of said
“ferry boat then filled with passengers, un-
“der the then existing and prevailing con-
“ditions, the said Petitioner Coggeshall
“Launch Co. and its said steam ferry boat
“Antelope, was guilty of gross and inexcus-
“able negligence, *and her said passenger,*
“George D. Early, *was drowned by reason*
“*of said carelessness and negligence.*”

(The italics are ours). The foregoing is amply sustained by the evidence, and the conclusions are drawn from the indisputable facts sustaining the findings.

It is easy to find definitions of Proximate Cause and rules relating thereto, but the application is more difficult. We must therefore turn to decisions of similar causes and find how the courts have applied the rules relating to Proximate Cause.

In 29 Cyc. P. 493 we find a fair statement in the text as follows:

In addition to the requirement that the result should be the natural and probable consequence of the negligence, it is continuously stated that the consequence should be one which in the light of attending circumstances an ordinarily prudent man ought reasonably to have foreseen might probably occur as the result of his negligence.

We cannot in this case intelligently discuss the question of the closed door and its relation to proximate cause without at the same time, and in connection with it, discuss the attending circumstances viz:—That the door would surely be opened.

In the case at bar the opening of the door cannot be considered as a new and independent cause, which could have produced the injury, without the original negligence in failing to put the bar in place. In fact it is not an intervening cause at all, but simply a condition, or an occasion, which made the injury possible, and a condition which ought to have been foreseen. The fact that the injury could not have occurred had the door remained closed, in no way serves to prevent the original cause from being the proximate cause. If the opening of the door be viewed, in the light of a cause, it is at most a concurrent cause, and the rule is well established that one is not relieved from liability for a negligent act, when some other cause is concurrent with the negligence in producing the injury. It is sufficient that the negligence occurring with one or more efficient causes, other than plaintiff's fault is the proximate cause of the injury so that where two causes combine to produce injury,

a person is not relieved from liability because he is responsible for only one of them (29 Cyc, 497 and cases cited there).

This brings us to the question as to whether the concurrent condition or cause was brought about by decedent's fault. We fail to see wherein he was at fault. He did not open the door. It was opened by Alva Moss and Emmett Whelihan. (Transcript 96, 106, 122, 137) When the door was within a foot or two of being open Early went to assist, but he **did not open the door**, and though he had, still, he would not have been at fault. The finding of the lower Court on that question is found on page 296 of the Trans.

Counsel for appellant in his brief lays great stress on the fact (as he sees it) that Early placed himself in a position of danger. But he overlooks the fact that the position was dangerous only because—**Petitioners' negligence made it so.** Did not Early have a right to assume, that the bar was in place for his protection as usual. He had seen that door opened many times during the five years in which he had crossed and recrossed Humboldt Bay on the Antelope. He had (according to our testimony) always seen the bar in place. According to their testimony he had usually seen it in place. He had come to rely upon it as his protection. Opening the door, was not a faulty act, nor a negligent act on the part of Early, because he had absolutely no way of knowing that the bar would not be in place as usual, and he had a right to rely upon its being there as usual,

and the open doorway was safe **had the bar been there.**

Counsel for appellant in his brief before the District Court (page 13) quotes from *Milwaukee Ry. vs. Kellogg* 94 U. S. 469, 24 L., Ed. 256 as follows:—

“But it is generally held that in order to warrant a finding that negligence or an act not amounting to a wanton wrong, is the proximate cause of an injury it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances.”

The attending circumstances here are that the door was invariably opened on the way over. (Trans. 84, 100, 102, 123, 148, 195, 280, 293) and the company had full knowledge of this fact, and they ought reasonably to have foreseen, that in opening that door the passenger engaged in the act, was apt to be thrown through the doorway either by a lurch of the ship or by losing his balance in the effort directed against the door. They ought to have foreseen too, that the door being opened all the passengers on the lower deck were exposed to danger if the bar were not in place.

In the case of *Hanley vs. Eastern S. S. Co.* a Mass., case reported in 109 N. E. 168. The facts are singularly similar to those in the case before us.

“There was evidence tending to show that there was, on a deck of the steamship where passengers were permitted to go, a space variously estimated at

from three to five feet between a lifeboat on one side and a life raft on the other, where there was no rail, guard or protection to prevent a passenger from walking, being thrown or falling over the ship's side to the water; that as the plaintiff's intestate, walking along at about 9 o'clock in the evening with a camp stool in his hand, was in the act of putting it down, the vessel gave a lurch and he fell overboard. If this evidence was believed, it was sufficient to support a finding of due care. It well may be found that a passenger upon an ocean-going steamship, during the voyage, may assume that no place where he is allowed to go will be left entirely without some construction to prevent a passenger from falling overboard."

We quote from P. 169.

"The manner of the accident was not left wholly to surmise or conjecture. If the testimony just narrated were taken at its full value, it reasonably might have been thought to show that the plaintiff's intestate was caused to fall overboard by the lurch of the ship and not by his own volition or lack of attention."

"It cannot be said as matter of law that he assumed the risk of such injury. If the jury believed that there was not adequate cause for him to know that there was no guard or protection, then there was no room for the operation of the maxim, "*Volenti non fit injuria*." Even though it may have been obvious that there was no chain or guard stretching over the space between the lifeboat and the raft, it might still have been

reasonable to assume that there was a rail or other protection at the edge of the deck.”

“The jury rightly were instructed that the only negligence for which it could be held responsible was that of its servants or agents. But there were several hundred passengers on this boat and necessarily some degree of inspection was required, in the exercise of the high responsibility resting upon the defendant as a common carrier, to see that the various parts and appointments of the vessel remained safe and were not put out of place or rendered dangerous by such ignorant or stupid persons as commonly might be anticipated among so large a number of passengers. The defendant was not obliged to act on the theory that passengers would wilfully remove guards placed for their protection; but if the danger that happened was one likely to occur, then the defendant would be required to provide against it, so far as reasonably possible. It properly was left to the jury to determine whether such reasonable inspection as it ought to have exercised, in view of the number of passengers carried and the nature of the particular place and its fittings, and the danger likely to follow from its becoming unguarded would have revealed the fact that the guard chain had become unfastened.”

On the question of breaking casual connection, a very strong case in point is the *Santa Rita* 176 Fed. Rep 890, an admiralty case before circuit Judges Gilbert and Morrow, and District Judge Hunt.

Plaintiff's ship had been damaged by fire caused by burning oil floating on the water of San Francisco Bay. The oil had been carelessly thrown from the

Santa Rita. How it had been set on fire was not clearly established, but it was not contended that the Santa Rita had any part in setting fire to the oil. Now it would seem, that here was an intervening cause that would serve to break the casual connection between the original negligence and the injury. At least the facts are infinitely stronger along that line than in the case at bar, yet the court says:—

“We are of opinion that the injury to the Boieldieu was the natural and probable consequence of the negligent act of the Santa Rita and ought to have been anticipated in the light of the surrounding circumstances. The circumstances which must be considered are the highly combustible nature of the oil, the condition of the tide and wind, the proximity of the wharf and shipping, the inflammable condition of the oil soaked wharf, and the many chances of accidental ignition to which the oil was exposed. Without doubt the natural and probable consequence of covering water with oil, might not under different circumstances, have had a natural tendency to produce any injury. If the oil had been dumped into the middle of the bay, far from any ship or wharf; if the wind and tide had been different; if the wharf had been fire proof; if the oil had been less inflammable; if the chance of fires had been much less—we might have reached a different conclusion. But, considering all the facts and circumstances, we must conclude that the injury done by the floating oil ought to have been foreseen, and that, therefore, the placing of it on the water was the proximate cause of the injury inflicted by its ignition.” (Milwaukee R. vs. Kellogg, 94 U. S. 469,

24 L. D. 256; Insurance Co. vs. Boon, 95 U. S. 117, 24 L. Ed. 395; Washington & Georgetown Ry Co. v. Hickey, 166 U. S. 521, 17 Sup. Ct. 661, 41 L. Ed. 1101; McGill v. Michigan S. S. Co., 144 Fed 788, 75 C. C. A. 518).

So in our case the employees of Appellant ought to have foreseen in view of the fixed custom that the door would be opened and that the passenger opening it was liable to be thrown into the bay, if the bar were not in place; and that therefore the failure to place the bar was the proximate cause of the injury.

In *Nehrens vs. Furnessia* (35 Fed. 798) the facts are singularly similar to those in the case at bar:

Libelant, a steerage passenger on the steamship F., in coming down from the deck to go to his quarters, fell through the fore hatch in the lower between decks, breaking his leg, for which injury this suit was brought. The hatch was ordinarily kept covered, and passengers were in the habit of walking over it. On the occasion in question the hatch had probably been opened to bring up provisions, but there was no light to enable libelant to see whether the hatch was open, nor was there any rail or guard around it. The libelant testified that he had never seen the hatch open, and did not know that it was liable to be open. Held, that the vessel was liable for libelant's injury, his damages being fixed at \$1,600.

The court says at page 799:—

“The habit of passengers to cross the hatch cover could not have been unknown to the officers of the ship and in the narrow space available for steerage passengers its

use more or less for that purpose was almost inevitable. It was the clear duty of the ship to provide reasonable security against the danger when the hatch was temporarily open by means of a rail or guard of some kind, and by sufficient light to enable the unusual danger to be perceived."

ILLUSTRATIVE CASES

"Where a person, driving carefully along a narrow highway on a dark night, turned to the left to avoid going down an unrailed embankment on the right, and thereby came in collision with a carriage approaching from the opposite direction, and was injured,—the want of the railing was a "defect," and was the sole cause of the injury."

Flaggs vs. Hudson, 142 Mass.
280.

"Where a narrow embankment used as an approach to a railroad crossing had precipitate banks, and was unguarded by railings, the negligence of the city in so maintaining it was deemed a proximate cause of an injury to a traveler caused by his horse going over such embankment, rendering the city liable in damages, although the fright of the horse was a contributory cause."

Harvey vs. Clarinda, 111
Iowa, 528; 82 N. W. 994.

"In an action for injuries sustained by being precipitated into a stream adjacent to the street, which was not protected by a barrier, an instruction authorizing a finding for the defendant if the accident was occasioned

by by-standers endeavoring to assist the plaintiff by taking hold of her horse was properly refused, since the intervening act of a third party did not excuse the defendant from liability for its negligence in failing to erect the barriers which was a proximate cause of the accident.”

San Antonio vs. Porter, 24
Tex. Civ App. 196; 59 S. W.
992.

“A street connecting with a bridge at an angle extended five or six feet beyond the line of the bridge, leaving an exposed place, which lead to one side of the bridge and across an unguarded abutment into the river. A pedestrian about to enter the bridge was suddenly confronted by a bicyclist, and, to avoid a collision, jumped to one side, and fell off the end of the street. It was held that, although the bicyclist had no right on the sidewalk, and the city could not have foreseen that he would be there unlawfully, he was not the proximate cause of the injury, but the proximate cause thereof was the city’s failure to keep the abutment guarded, which rendered the city liable.”

Knouff vs. Loganport 26 Ind
App 202; 59 N. E. 347.

But in the case at bar the appellant could readily foresee, that if it were one deck hand short, that it would not have any one to put up the barrier (the bar) and thereby protect their passengers. Appellant could readily foresee that if the barrier (the bar) was not put in place a passenger was liable to fall overboard; all this the appellant could readily foresee.

The object and purpose of the statute, rules and regulations requiring the petitioners to have two deck hands, was to protect the lives of the passengers. They violated the law in having but one deck hand, and instead of assigning him to look after the protection of the passengers they put him to taking up tickets, entirely disregarding the safety of their passengers. *Therefore the violation of the statute, rules and regulations by petitioners in navigating the vessel one deck hand short was the proximate cause that resulted in the death of George D. Early.*

The nearest—in point of time or space—may not be the responsible agency at all. But in this case the company is liable whether the violation of the statute be considered the proximate cause or whether the negligent act of failing to place the bar be considered the proximate cause.

(C) THE KNOWN CUSTOM OF PASSENGERS TO OPEN THE DOOR.

(1) How it affects the question of legal liability.

This is really only another way of asking whether the opening of the door ought reasonably to have been foreseen.

The undisputed evidence is and the lower court has found that the door was invariably opened by the passengers before reaching the landing, on those occasions when the door happened to be closed; (Trans. 84, 100, 102, 123, 148, 195, 280, 293) and the evidence conclusively shows this practice had been

followed by the passengers for a number of years and the custom was well known to the company. The legal effect of this custom, and the knowledge, is best brought out by the following excerpts from cases:—

“Defendant piled lumber on a sidewalk in a public street in the vicinity of the homes of a number of children, with knowledge that the children were in the habit of congregating there and climbing on the lumber while at play. Plaintiff’s intestate was killed by the falling of the lumber so piled; a verdict finding that the defendant’s negligence was the proximate cause of the injury was justified. True etc., Co., v. Woda, 201 Ill. 315, 66 N. E. 309.”

“Plaintiff, a boy of four years, while passing along a highway climbed on a fence situated on defendant’s adjoining land and separating it from the highway, for the purpose of climbing over it. The fence, which was so defective as to constitute a nuisance, fell on plaintiff and injured him. It was held that as plaintiff in climbing on the fence was merely doing an act which defendant **ought to have contemplated as likely to be done by children** using the highway, defendant was not entitled to avail himself of the defense that the injury was caused by plaintiff’s own act, and that plaintiff was entitled to recover.”

Harold v. Watney, (1898) 2 Q. B. 320, 67 L. J. Q. B. 771, 78 L. T. Rep. N. S. 788, 46 Wkly Rep. 642.

Petitioner and appellant in this case have no reason to urge the opening of the door to excuse them from the effects of their negligence. It is only a condition or a circumstance in the chain of events, and

moreover a circumstance which should have been foreseen and which was almost sure to happen. The lower court in its findings uses this language:—

“The custom of so opening said cargo port door was well known to all the officers and employees of the boat and was also known to Captain Walter Coggeshall, the president of Coggeshall Launch Company.”

In *Ind. St. Ry. Co. vs. Robinson*, (61 N. E. Rep. 936) the Court said;

“But appellant **was bound to know** that crowds might congregate upon its platform and injury to its intended passengers might result from defects in its platform under such circumstances. The presence and struggle of crowds to get upon appellant’s car only increased the danger of accident. It did not excuse or relieve appellant from responsibility for such accident.”

So in the case of *Catherine Glen vs. Boston Elevated Ry. Co.*, 32 L. R. A. (U. S.) 470, also 207 Mass. 497, the Court said;

“A common carrier of passengers is required to exercise the utmost care consistent with the nature and extent of its business, to carry passengers in safety to their destination and to enable them to alight there with safety. This extraordinary vigilance is owed not only as to its own instrumentalities and employees, but also as to **other passengers** or strangers so far as any harmful misconduct on their part **may be foreseen** and guarded against.”

And again at p. 474; “Evidence as to what has been the custom of a crowd at a

particular place or under special circumstances in boarding defendant's cars was competent because a Ry. Co. has **reasonable cause to know what has been habitually done respecting its cars.** It bore upon the care which defendant ought to have exercised, and the protection it ought to have furnished to its passengers who were entitled to alight."

ILLUSTRATIVE CASES ON CUSTOM.

Where it is shown that passengers were in the habit of alighting at a point a short distance from a station and on the side opposite thereto where there was a parallel track, and such custom was known to the Ry. Co. the act of a passenger in alighting at such a place is not, as a matter of law, negligence, and where such passenger was struck and run over by a train on a parallel track, question of negligence was for a jury, and judgment for Plaintiff was affirmed. (Penn. Co. vs. McCaffery 173 Ill. 169, affirming 68 Ill. App. 635).

Where a railroad Co. was in the habit of obstructing street crossings with its trains, and the public were in the habit of climbing over, crawling under and going around trains, to cross track, it was the duty of the Co. to move such trains, in accordance with the known custom of the people and to take such care to avoid injury to persons who might attempt to cross behind such trains. (A. T. & Santa Fe Ry. vs. Cross, 58 Kan. 424).

If, a custom among street Ry. employees, known

and assented to by the company, those who are on duty are in the habit of calling for and receiving assistance from those not on duty, and one of the latter renders the assistance asked, he will be regarded as in the company's employ for such service and if he negligently abandons it whereby injury to passengers occur, the company will be liable. (*Leavenworth Electric Ry. Co. vs. Cusick* 60 Kansas 590).

Where a boy, eight years of age, crawled under cars that blocked a street crossing, and was run over by an engine backing against cars, it was error to direct verdict for the Co. as the question of negligence was for the jury, where it appeared that it was the custom of persons in the neighborhood, to crawl under cars when the street was blocked. (*Hofler's Adm'r. vs. So. Ry. Co.*, 31 Ky. Law Rep. 1020).

Where the public has, for years used a Ry. bridge or track as a footpath without objection by the Ry. Co., and by reason of such custom, people may be expected thereon, it is the duty of those in control of passing trains, in view of such custom, to use reasonable precautions to prevent injury to such people **even though they be trespassers**. (*Young vs. Clark* 16 Utah 42, also 3 Am. Neg. Rep. (new series) 315).

Long continued custom is evidence of invitation to board trains at a particular place.

Chicago Etc. vs. Dean, 195 Ill. 168.

American Etc. vs. Resley, 175 Ill. 295.

Carver vs. Minn. Ry. Co., 120 Iowa 346.

(2) WHAT IS THE LEGAL EFFECT IF
DONE CONTRARY TO ORDERS.

In the first place there is not a scintilla of evidence that Early ever heard an order not to open the door if one were ever given. The District Court has found (Trans. 294) that George D. Early, deceased, had never had any knowledge or notice of any efforts made by the officers and crew to prevent passengers from opening the door. There is no evidence that any such order had ever been posted. There was some evidence (denied by witnesses for claimant) that such a request had been made to some of the passengers. But when it had been made or who heard it, if made, does not appear. We deny that such request had ever been made, but for the sake of argument let us assume that a request of that kind had been made; Let us go further and assume that Early had heard the request. The fact is that the door was opened regularly by the passengers **just the same.**

Quoting from RULING CASE LAW, Vol. 5,
page 23:—

“There can be no doubt, however, that a carrier after making a rule in regard to the conduct of passengers may waive and abandon it and treat passengers as if it had never existed and thus lead them to believe that the rule is no longer in force. If the carrier does this, it cannot set up the rule to defeat the rights of a passenger who has acted in the well warranted belief that the rule is not in force.”

In *Kane v. Erie Ry. Co.* (C. C. A.) 142 Fed. 682, the question of negligence arose where, if defendant had a rule or an order, which was habitually broken by deceased, and that fact was known to defendant. We quote from the syllabus only:—

“Plaintiff’s intestate, who was a fireman on an engine on defendant’s railroad, was killed while his train was in the yards of the company, as the result of a collision alleged to have been caused by the negligence of the engineer of another train. Deceased was at the time standing on the running board on the front of his engine cleaning the headlight or number plate, and the engine was backing very slowly, drawing a number of cars after it. It was clearly shown that it was the custom of firemen on defendant’s road to do so during the day, sometimes while the engines were in motion, and that such custom was known to and sanctioned by the company, although a rule provided that firemen should clean the engines ‘at the end of the trip.’ Held that, **in view of such general custom, which in effect abrogated the rule**, the deceased could not be said as matter of law to have been guilty of contributory negligence in being in the position where he was at the time of the collision, but that such question was one for the jury.”

Again in *Carver v. Minneapolis and St. Louis Ry. Co.*, 120 Iowa 346, also in 14 Am. Negligence Reports vol. 14 (current Series) P. 33, the Court says:—

“Plaintiff was not bound to assume, that because on previous occasions the defendant had allowed the mail bags to be thrown from its trains in a negligent way,

such negligent conduct would be continued, but had a right to assume that it would be discontinued.

“BUT even if the mail bags had never before been thrown so as to imperil a person at the north end of the platform, in the exercise of reasonable care on the part of defendant, it would have anticipated an accident as likely to occur at that place from the general practice of throwing the mail bags from the train while in motion. The general practice was negligent; it imperiled the safety of persons on the platform; and we do not think that the jury was bound by the instruction to say that, if the bags had never before been thrown off at the north end of the platform, the usage, if persisted in, was not likely to imperil persons standing at that place. **It was the general usage of throwing bags from the train while in motion, and not the usage of throwing them to the middle of the station platform, which constituted the negligence properly complained of.**”

So in this case it is the general custom of allowing passengers to open the door that is negligence, and not the one opening of the door at the time of the injury.

But even stronger is the case of *Weisshaar vs. Kimball S. S. Co.* 128 Fed. Rep. 401. A case in which an officer of the boat started to carry passengers in a small boat out to the ship lying at anchor. The testimony showed that the officer warned the passengers before starting that the small boat was overloaded and ordered or requested some of them to get out. In spite of his orders 18 persons remained in the boat while its capacity was only 14, in consequence of which plaintiff's intestate was drowned.

The District Court (Judge De Haven) held that in disobeying the order, deceased assumed the risk and no recovery could be had (123 Fed. Rep. 838).

The Circuit Court (Gilbert and Ross, Circuit Judges) reversed the decision (128 Fed. Rep. 400). The opinion is written by Ross, Circuit Judge, in which he says:—

“It was the clear duty of the officer, in the first place, to have stopped the entry of more than the boat’s complement of men. According to his own testimony, he made nothing more than a milk and water protest against the entry of any one; and even if there had been on the part of the passengers an effort to over power the officer and force their way into the boat—of which there is not the slightest evidence—it **still remained the imperative duty of the officer in command to refuse to start the boat until enough of the people had gotten out to make it safe.** Not the slightest attempt appears to have been made by the officer to perform his duty in that regard, and for his gross negligence in that respect, as well as in failing to return to shore while he yet had sufficient opportunity; the ship is clearly liable, for, even where an injured party is guilty of contributory negligence, such negligence will not defeat the action when it is shown that the defendant might, by the exercise of reasonable care and prudence, have avoided the consequences of the injured party’s negligence.”

Grank Trunk Ry. C. v. Ives, 144 U. S. 408.

12 Sup. Ct. 697.

36 L. Ed. 485.

Louisville & Nashville Ry. Co. v. East
Tennessee, V. & G. Ry. Co., 60 Fed.
993.

I. C. C. Ca. 314.

Harrington v. Los Angeles Ry. Co.
(1903) Cal. 74.

Pac. 15.

This doctrine, which is well established, fits the present case exactly. The case of Lynn v. Southern Pacific Co., 103 Ca. 7, 36 Pac. Rep. 1018, 24 L. R. A. 710, is, in principle, also precisely in point. In that case the plaintiff passenger was unable to find room inside a car, and therefore stood upon the platform, from which he was thrown and injured; the evidence tending to show that the train was going at excessive speed. In affirming a judgment for the plaintiff, the Supreme Court of California said:

“The defendant should not have allowed so many passengers to have gone upon its cars, and, if it was unable to prevent them from so doing, **it had the right to refuse to move the train under such circumstances**; but, if it did not pursue that course, and undertook to transport all passengers that were on board, whether within the cars or upon the platform, it was under obligation to exercise the additional care commensurate with the perils and dangers surrounding the passengers by reason of the over crowded condition of the cars.”

So, here, as has already been said, if the officer in command of the boat had been unable to prevent overloading (of which, however, here was no evi-

dence), it was still his right and imperative duty to refuse to start the boat until enough of the passengers had gotten out to make it safe to do so. There is nothing in the record to justify the contention that such action on his part would not have been acquiesced in and conformed to. But speculation on that point is no answer to the gross neglect of duty on the part of the officer of the ship.

“With regard to the question as to the duty of a carrier to take active measures to prevent a passenger from going into a dangerous place as distinguished from the question of the negligence of the carrier in allowing the place to become dangerous, it has been laid down that a carrier does not discharge its entire obligation by giving notice of a certain rule as to where passengers may go, and, if the custom of passengers to disregard the rule is so common as to charge the servants of the road with notice of it, then it is the carrier’s duty either to take active measures to enforce the rule, or to make the disregard thereof safe. (*Chicago etc. Ry. Co. v. Lowell*, 151 U. S. 209, 14 S. Ct. 281, 38 U. S. (L. Ed.) 131).

So in the case at bar, it became the imperative duty of the officers and servants of Petitioners and Appellant to **prevent** the opening of that door when they knew that the bar was down. A mere milk and water protest on their part issued perhaps months or years before cannot now be used to excuse them from the result of their own gross negligence. It is weak and silly for them to say that they could not prevent the passengers from opening the door. If

they are unable to enforce rules which are made to protect passengers from known danger then they have no right to be in the business of carrying passengers. Consider for a moment one of the great companies engaged in ferrying passengers between San Francisco and Oakland. Consider the great crowds that they daily and hourly control. Imagine one of those companies coming into court with a plea that it was unable to enforce a regulation made for the safety of passengers. Yet here is this petitioner and appellant admitting that they could not or at least did not control a few mischievous boys. Such weakness is in keeping with the disregard of human life shown by running one man short, and leaving the protecting bar out of place. The fact that they have operated the Antelope for so many years with that door open, and have carried something like 300,000 passengers (according to the mathematics of counsel) without an accident, proves that the bar was a most effectual safeguard, and the fact that an accident happened the first time it was down, proves that the place was dangerous without it, and that it was gross negligence to leave it down. *Res Ipsa Loquitur*.

And if it be true that the bar had been left down on other occasions, then they escaped accident by good fortune which they ill deserve. And should they escape the payment of monetary damage in this case it is safe to assume that they will go merrily on, disregarding rules, regulations, statutes, and precautionary measures, depending on their good for-

tune, until some other victim or victims be offered on the altar of corporation greed and carelessness.

We submit that the evidence fully sustains the findings of the Honorable District Court.

6th SUBDIVISION.

THE ELEVENTH ASSIGNMENT OF ERROR.

11. "The said District Court erred in finding that the petitioner Coggeshall Launch Company had not protected and warned passengers against opening of the cargo-port door by said passengers and thereupon rendering judgment in favor of said claimant."

The finding of the Honorable District Court is as follows:

"That the said passenger, George D. Early, deceased, had never had any notice or knowledge of any efforts made by the officers and crew of the said ferry-boat 'Antelope' to prevent the passengers thereof from opening the said cargo-port door, either by the posting of notices or otherwise."

We submit, that there is not a scintilla of evidence in the whole case, that shows or tends to show that the passenger George D. Early ever had any notice or knowledge of any efforts made by the officers and crew of the said ferry-boat "Antelope" to prevent the passengers thereof from opening the cargo-port door, either by posting notices or others. This being the fact the findings of the court is sustained by the evidence in this particular.

7th SUBDIVISION.

THE TWELFTH ASSIGNMENT OF ERROR.

This assignment is as follows:

“The said District Court erred in finding that knowledge of the custom of passengers opening the cargo-port door against orders of the petitioner Coggeshall Launch Company was negligence by the said petitioner and thereupon rendering judgment in favor of said claimant.”

The finding of the Honorable District Court, which this assignment of error assails is in the words as follows:

“That the said cargo-port door was invariably opened by some one of the passengers before reaching the Eureka dock, usually being opened when the landing whistle was blown. That immediately (241) upon the blowing of the whistle, on said steam ferry-boat ‘Antelope’, for landing and while still in the open water of the bay at some distance from the dock, some passenger or other would open the said cargo-port door was not a casual occurrence, nor even merely a frequent occurrence, but was an invariable custom that had been in vogue for a number of years. This custom of so opening the said cargo-port door was well known to all the officers and employees of the said steam ferry-boat ‘Antelope,’ and was also known to Captain, Walter Coggeshall, the president of petitioner, Coggeshall Launch Company.”

This finding of the Court is fully sustained by the evidence; in fact, we are safe in saying that it

is in no way denied and is virtually an admitted fact in the case.

8th SUBDIVISION.

THE THIRTEENTH ASSIGNMENT OF ERROR.

The thirteenth assignment of error is couched in the following language, viz:

“The said District Court erred in finding that the death of George D. Early resulted from a failure by petitioner Coggeshall Launch Company to prevent the continuance of the custom of passengers to open the cargo-port door and thereupon rendering judgment in favor of said claimant.”

We submit that the foregoing is not a fair assignment of error on the findings of the court. For, in no place does the Hon. District Court find as a fact “that the death of George D. Early resulted from a failure by petitioner Coggeshall Launch Company to prevent the continuance of the custom of passengers to open the cargo-port door.”

Here are the findings of the court as to what the death of George D. Early resulted from, found on page 296 of the Transcript, viz:

“That in operating the said steam ferry-boat ‘Antelope’ on the voyage, day and evening hereinbefore found, one man short contrary to the requirements of law, resulting in the fact that the bar across the said cargo-port door opening was not in place; and leaving the dock at Samoa without having the said bar in place across the

“cargo-port opening some six or eight feet
“wide, leading directly to the water, on
“said lower deck of said ferry-boat then
“filled with passengers, under the then ex-
“isting and prevailing conditions, the said
“petitioner, Coggeshall Launch Company,
“and its said steam ferry-boat ‘Antelope’
“was guilty of gross and inexcusable care-
“lessness and negligence, and her said pas-
“senger George D. Early was drowned by
“reason of said carelessness and negli-
gence.”

Therefore it can be readily seen that the thirteenth assignment is not in accord with the actual facts found and therefore the assignment of error cannot be allowed. And further, this finding is fully sustained by the evidence.

9th SUBDIVISION

THE FOURTEENTH ASSIGNMENT OF ERROR.

The fourteenth assignment of error is as follows:

“The said District Court erred in find-
“ing that the claimant was damaged by pe-
“titioner Coggeshall Launch Company in
“the sum of \$5,000 and thereupon rendering
“judgment in favor of said claimant.”

We submit that the finding of the Court that claimant was damaged by petitioner Coggeshall Launch Company in the sum of \$5,000.00 is fully sustained by the evidence. And therefore to cite facts and authorities in support thereof are wholly unnecessary.

10th SUBDIVISION.

THE FIFTEENTH ASSIGNMENT OF ERROR.

This assignment is as follows:

“The said District Court erred in finding that the death of George D. Early resulted from the negligence of the petitioner Coggeshall Launch Company in operating the steam vessel ‘Antelope’ with a crew one man short, the failure to have another member to perform the duties of said absent member of the crew and to put the bar in the cargo-port door of steam vessel ‘Antelope’, and to thereupon render judgment in favor of said claimant.”

The finding of the Court on this, as on other points, is fully sustained by the evidence.

(1) There are two causes of the injury viz; running one man short in violation of the statute; and failure to put up the bar. Either of these may be considered the proximate cause of the injury and either or both constitute negligence on the part of appellant for which they are legally responsible.

(2) The fact that the door was closed does not relieve them from liability because they knew that the door would in all human probabilities be opened before the voyage ended.

(3) The opening of the door does not break the causal connection between the negligent act of failing to put the bar in place and the injury, because the opening of the door was merely a circumstance or condition which ought reasonably to have been foreseen.

(4) There is no assumption of risk or contributory negligence because the opening of the door was not an act of negligence of decedent. The decedent had a legal right to presume that the bar was in place for his protection, and the open doorway with the bar in place was not dangerous. Decedent could assume no risk of a danger of which he had no knowledge and one which was caused by petitioner's negligence in failing to put up the guard rail.

The material facts in the case are not seriously disputed. The District Court has made its findings of fact and we assume that the appellate court will not go back of that finding. That they were running one man short is admitted. That they failed to put up the bar is admitted. That the bar was **always** up when the door was closed is disputed and that it was usually up is admitted. That it was the fixed custom for passengers to open the sliding door is admitted, and that the company knew of this custom is admitted.

They seek to avoid responsibility for not putting the bar in place by pointing to the fact that the door was closed. We answer that the closed door did not give protection beyond a certain point in the voyage, and this was known to the company, it was therefore negligence for them to leave Samoa without the bar being up. If that be true and their negligence was the proximate cause of the injury then they are liable.

Island and Seaboard Coasting Co. vs.
Tolson, 139 U. S. 551.

Ellsworth vs. Hunt, 168 Fed. 506.
City of Winona vs. Botzel, 169 Fed. 321.
Southern Pacific Ry. Co. vs. Cavin, 144
Fed. 348.

N. Jersey Ry. C. vs. Purdy 142 Fed. 955.

The decision of the case in the District Court evidently rested upon a consideration of two questions:—

1. Liability imposed by violating the statute.
2. Liability imposed by failing to put the bar in place.

LIABILITY IMPOSED BY VIOLATION OF A STATUTE.

(A) Was there a casual connection between the shortage and the accident.

We wish to call the court's attention to the finding of the lower court on this question found on page 295 of the Transcript in the following language:—

“That the said steam ferry-boat ‘Antelope’ on the said voyage and evening when
“the said passenger George D. Early, now
“deceased, was drowned, as hereinbefore
“found was being operated with one man
“short contrary to the requirements of law,
“and that it was owing to the absence of this
“man, was due the fact that the said bar
“was not in place across said cargo-port
“door opening on said lower deck of the said
“steam ferry-boat.”

We hold in this case that there is unquestionably such a connection. It cannot be denied that had the

bar been in place the accident would not have happened. The evidence on behalf of claimants shows that before the night in question the bar had **always** been placed in position **by Nick**, the absent deck-hand, regardless of whether the door was open or closed. If we believe the testimony of claimant's witnesses then unquestionably Nick would have placed the bar as usual had he been there. But Appellant's witnesses testified that Andrew, not Nick, usually placed the bar in position. Very well, then Andrew failed to put the bar in place because he was taking Nick's position, that of collecting tickets, and it is but a lame excuse for petitioners and appellant to say that having been negligent in running one man short, they permitted the other man to leave his usual post of duty to take tickets, thereby admitting that they gave more care to the collection of tickets than to the safeguarding of human lives. If they removed Andrew from his (according to their testimony) duty, which was to put the bar in place to fill that left vacant by Nick, thereby caring for the dollars in utter disregard of human lives, then they were guilty of such gross and even criminal negligence as to call for a punishment more severe than the payment of monetary damages.

We do not overlook the fact that some of Appellant's witnesses testified that on some other occasions the bar had been left down when the door was closed. If their testimony be true, then all we can say is that on these particular occasions, the passengers were left without any protection whatever after

the landing whistle sounded and the passengers had opened the cargo-port door according to their regular custom. Even if the testimony be true, deceased was not bound to assume that because on some other occasions they had been negligent, such negligence would continue. (Carver vs. Minneapolis Ry. Co. 120 Iowa 346). And negligence on former occasions is no excuse for negligence on this occasion. We cannot believe their testimony however, because we cannot bring ourselves to believe that any person to whom had been intrusted the care of passengers would have such an absolute disregard for the preservation of human lives. If a man were on duty entrusted with the care of putting that protecting bar in place, then we can scarcely conceive of his disregarding so important a duty. The only reasonable explanation of the missing bar lies in the fact that the man was not there to put it in place. If that be true then there is no question of the causal connection between the shortage of one man and the accident.

If it were Andrew's duty to place the bar, and Andrew was removed from his post of duty to fill the post left vacant by Nick, then the causal connection between the shortage and the accident is clearly established.

(B) DID THE SHORTAGE OF ONE MAN
CONSTITUTE NEGLIGENCE PER SE.

The statutory requirements are as follows:

Any vessel of the United States subject

to the provisions of this title or to the inspection laws of the United States shall not be navigated unless she shall have in her service and on board such complement of licensed officers and crew as may, in the judgment of the local inspectors who inspect the vessel, be necessary for her safe navigation. The local inspectors shall make in the certificate of inspection of the vessel an entry of such complement of officers and crew, which may be changed from time to time by indorsement on such certificate by local inspectors by reason of change of conditions or employment. Such entry or indorsement shall be subject to the right of appeal, under the regulations to be made by the Secretary of Commerce, to the supervising inspector and from him to the Superior Officer to set aside or affirm the said determination of the local inspectors.

If any such vessel is deprived of the services of any number of the crew without the consent, fault, or collusion of the master, owner, or any person interested in the vessel, the vessel may proceed on her voyage if, in the judgment of the master, she is sufficiently manned for such voyage; PROVIDED, that the master shall ship, if obtainable, a number equal to the number of those whose services he had been deprived of by desertion or casualty, who must be of the same grade or of a higher rating with those whose places they fill. If the master shall fail to explain in writing the cause of such deficiency in the crew to the local inspectors within 12 hours of the time of the arrival of the vessel at her destination, he shall be liable to penalty of \$100.00, or, in case of an insufficient number of licensed officers, to a penalty of \$500.00 (Rev. Stats. 4453).

In case of desertion or casualty result-

ing in the loss of one or more seamen the master must ship, if obtainable a number equal to the number of those whose services he had been deprived of by desertion or casing and equally experienced with those whose place or position they refill, and report the same to the United States consul at the first port at which he shall arrive without incurring the penalty prescribed by the two preceding sections. (Rev. Stats. Sec. 4516 Acts of July 5, 1884 and Fed. 14, 1903).

The requirement that the vessel have two deckhands has the force of law. (71 Fla. 210).

There is no question but that in running one man short petitioners were violating a statute, and the violation of a statute is universally considered negligence per se in those cases where damage results from such violation. The rule is to be found in both State and Federal decisions repeated many times. It is well stated in a California decision, **Siemers vs. Eissen** 54 Cal. at P. 420 from which we quote as follows:—

“The failure of any person to perform a duty imposed upon him by statute or other authority should always be considered evidence of negligence, **or something worse**. Whether it constitutes such negligence as tended to cause the injury to the Plaintiff, in any particular case is another question, the principles governing which are stated elsewhere; but such an omission must constitute just cause for complaint on the part of the State, if not of individuals; when no evil intent appears, the omission may properly be regarded as simple negligence. The

omission to perform a legal duty being proved, the Plaintiff ought not to be required to prove further that the act omitted was inherently essential to the exercise of due care by the defendant. Thus, if a railroad Co. is required by law to fence the track, to ring bells, or to give other warning of danger or if one building a wall is required to make it of a certain thickness; or if obstruction to a street is prohibited, a violation of any of these legal regulations is sufficient evidence of negligence."

(Sherman & Redfield on Negligence,
Par. 13a).

"So if a specific duty is imposed upon any person by law, or by legal authority, an action may be sustained against him by any person who is specially injured by his failure to perform that duty." (Id p. 54a).

"It is an axiomatic truth that every person while violating an express statute is a wrong doer, and as such is ex necessitate negligent in the eye of the law; and every innocent party whose person is injured by the act which constitutes the violation of the statute is entitled to a civil remedy for such injury, notwithstanding any redress the public may also have." (Jetter vs. N. Y. & Harlem Ry. Co. 2 Abbot 464).

It is also discussed in Thompson on Negligence, 2nd Ed. Par. 10. That the failure of any person to perform a duty imposed by statute or legal authority is sufficient evidence of negligence, has been repeatedly declared by the California Courts:

McKune vs. Santa Clara V. M. & L. Co.
110 Cal 481.

Craig vs. Los Angeles Etc. 154 Cal. 663.
Simonean vs. Pacific Electric Ry. Co.
166 Cal. 269.
James vs. Oakland Traction Co. 10 Cal.
App. 785.
Fenn vs. Clark 11 Cal. App. 81.
Seragg vs. Sallee 24 Cal. App. 144.
Slaughter vs. Goldberg 26 Cal. App. 327.
Hayes vs. Mich. Etc. 111 U. S. 240.
Driscoll vs. Cable Ry. Co. 97 Cal. 553.
(The Farragut 10 Wall. 334).

11th SUBDIVISION.

THE SIXTEENTH ASSIGNMENT OF ERROR.

This assignment is as follows:

“The said District Court erred in not
“finding that (252) the death of George D.
“Early resulted from the contributory neg-
“ligence of said George D. Early in that he
“assisted in creating the open unprotected
“doorway through which he fell to his
“death, and in that he approached a door-
“way which, was apparent to said George
“D. Early, was unprotected.”

CONTRIBUTORY NEGLIGENCE AND ASSUMPTION OF RISK.

On this question the District Court has found as follows: (Trans. 296).

“That the said George D. Early, now
“deceased, did not open the door at the
“place where he fell through, and he did not

“contribute in any degree to the lack of
“protection at said place on said ferry-boat,
“‘Antelope,’ occasioned by the absence of
“said bar.”

Definition:—Contributory negligence in its legal significance is such an act or omission on the part of plaintiff, amounting to an ordinary want of care, as concurring or co-operating with the negligent act of defendant is the proximate cause or occasion of the injury complained of.

29 Cyc 505 and cases and authorities
there cited.

An essential requirement is that the act of the person injured must be a **negligent** act. It is not sufficient merely that the act contribute to the injury, as it is the contributory **negligence** and not the contributory act which defeats recovery. Contributory negligence necessarily assumes negligence on the part of the defendant. If, therefore defendant pleads and argues contributory negligence as a defense in this case, he must therefore first admit negligence on his own part.

While in most jurisdictions contributory negligence will defeat recovery it is not so in Admiralty. There the doctrine of comparative negligence still prevails.

“The rule that contributory negligence
“bars a recovery is not applicable in admir-
“alty.”

The Wanderer, 20 Fed. Rep. 140.

The Explorer, 20 Fed. Rep. 135.

The James M. Thompson, 12 Fed. Rep. 189.

The Mabel Comeanx, 24 Fed. Rep. 490.

Counsel for petitioners argues strenuously and at length, that Early's death was caused by his own negligence and that therefore he is barred, and that his negligence consisted in:—

- (1) Taking a dangerous position.
- (2) Disregarding orders not to open the door.
- (3) In failing to use his faculties and observe the danger.

In answer to his first line of argument viz: that Early took a dangerous position, nothing more is necessary than to point out the position taken by Early was absolutely safe **had the bar been up.**

The general rule is that every person has a right to presume that every person will perform his duty and obey the law, and in the absence of reasonable ground to think otherwise it is not negligence to assume that he is not exposed to danger which can come to him only from violation of law or duty to such other person.

29 Cyc. p. 516 and numerous cases there cited.

Failure to anticipate defendant's negligence does not amount to contributory negligence.

Dixon v. Pluns 98 Cal. 384; 20 L. R. A. 698.

District of Columbia v. Bolling, App. Cas. (D. C.) 397.

Mahan v. Everett 5 La. Ann. 1162; 23 So. 883.

Healey v. Ehret 58 N. Y. Suppl. 917.

Dohn v. Dawson 35 N. Y. Suppl. 984.

This is especially true where a defendant by his conduct has thrown the person injured off his guard, so that the want of diligence was the consequence of defendant's conduct.

29 Cyc. 517 and cases.

Early had for five years, been riding back and forth on the "Antelope" daily, and had been accustomed to open the door or see it opened and had always relied on the bar; so on this occasion he was thrown completely off his guard, by relying on the protection of the bar. (Trans. 79, 95, 96, 100, 101, 120, 123, 139, 147).

Counsel's argument of contributory negligence on the ground of Early's disobeying "orders", have been completely answered heretofore.

FAILURE TO USE HIS FACULTIES.

While we are aware that failure to use one's faculties to observe a danger is many times held to be contributory negligence, yet those are cases in which the danger was open and the circumstances were such that a person using ordinary care would have seen and avoided the danger. But in this case Early had no chance to use his faculties. The dangerous character of the place was not revealed **until the door was opened**. He was pushing with his left hand with his back toward the place where the bar should have

been. This is shown by the fact that he fell backwards into the water. (Trans. 107, 132, 140, 152, 122, 137). There is no evidence that he had any opportunity to observe the absence of the bar, and we must always remember that the burden of proving contributory negligence is upon Petitioners. The presumption always is that a person used ordinary care to protect his own life.

The true test of whether one is guilty of contributory negligence is not what would be done by a prudent man generally, but what a man of ordinary prudence and care would do under similar circumstances.

Missouri etc. Ry. Co. vs. Wylie, 26 S. W. Rep. 85.

Where the danger is not so obvious that a person should have seen it in the exercise of ordinary care, failure to discover it is not negligence, and if the conditions are such as to mislead a person for failing to look for danger, when under the surrounding circumstances he had no reason to apprehend any, it is not negligence.

29 Cyc. 514 and cases cited.

Who can say in this case, that Early had a chance to use his faculties. Any one, no matter how prudent, under similar circumstances might have been projected through the unprotected doorway by the same force (Whatever it was) that sent Early to his death. The fact that the two young men who did open the door, were not thrown into the water is due,

no doubt, to the fact that they faced the unprotected doorway while Early had his back to it. (Trans. 122, 132, 134, 137, 140, 155).

While in the Federal Court contributory negligence is a defense, yet the burden of proof of contributory negligence is upon the defendant. Reasonable presumptions and inferences in respect to matters not proven or left in doubt should be in favor of the injured party. (Wabash Ry. Co. vs. Central Trust Co. (c. c.) 23 Fed. 738.

Courts of admiralty have such greater power than courts of common law in dividing the damages in accordance with the fault of negligence which is properly to be charged to either party.

Quoting from *The Steam Dredge No. 122* Fed. at P. 687:—

“Although the libelant placed himself in a position of some danger, he clearly did not appreciate the great danger he was actually in for he did not know it, and did not have reason to know it. Under the doctrine of the cases which we have cited, while he is charged with notice of some danger, he did not appreciate the risk he was taking for he did not know the danger he was actually assuming.”

In *Ward vs. Damp*. Kjoebenhaven 136 Fed. 502. A case in which the facts seem to present a much stronger case of contributory negligence than the case at bar. In that case the decedent was warned of the danger yet the court there says;

“Contributory negligence is a defense in a Federal Court but the burden of proof

is upon the defendant. The **presumption** that the decedent used due care is in his favor. If Dr. Ward knew and appreciated the danger surrounding him, which caused the injury, then he may be held to have voluntarily assumed the risk; but mere notice that there was some danger without appreciating the extent of it will not of itself preclude a recovery, citing *Firkett vs. Fibie Co.* 91 Me. 268; 39 Atl. 996.

“Contributory negligence is not found in a failure to exercise the best judgment or to use the wisest precaution, but allowance must be made for the extent of information one may possess of the nature of the danger by which he is surrounded, or as to whether he fully realizes from his limited knowledge what he shall do to avoid the danger.”

In *Winters vs. Baltimore & O. R. Co.* (177 Fed. 46) the question arose as to whether riding in a dangerous place constituted contributory negligence; the court held that the fact that plaintiff was accustomed to ride there and that this custom **was known** to the employees of defendant were elements in determining whether as a matter of law there was contributory negligence. The Court says:—

“Under all the circumstances of this case, especially in the absence of clear proof that Winters knew or had reason to know that this crossing had not been put in safe condition after he saw the last work done on it, and in view of the previous habits of employees of riding on the top of the car with the knowledge both of the conductor and the section foreman; under such circumstances, a license to ride upon the top

of the car may, it seems, be fairly implied. *Ellsworth vs. Metheney* (104 Fed. 119, 122; 44 C. C. A. 484; 51 L. R. A. 389)

It should have been left to the jury to say whether in thus riding upon the top of the car, he was, under the circumstances, guilty of negligence of which the injury received was the natural and probable consequence which ought to have been foreseen in the light of the attending circumstances, so as to make it a proximate cause of the injury and bar any recovery to which he might otherwise have been entitled."

"The defendant's argument that if the plaintiff was guilty of negligence in reference to the condition of the track, which was a proximate cause of the injury, *Winters* must necessarily also have been guilty of negligence contributory to the injury, fails to take into account; (1) The fact that *Winters'* contributory negligence is to be determined not merely by such knowledge as he may have had of the condition of the track, but also of the rate of speed at which the train was moving and all the other surrounding circumstances at the time of the accident, and (2) the different degree of care required of master and servant in reference to discovering or knowing the dangerous condition."

In reference to this last question, the court said in *Railway Co. vs. Jarvi* (53 Fed. 65, 3 C. C. A. 433).

"But the degree of care in the use of a place in which work is to be done, or in the use of other instrumentalities for its performance required of the master and servant, in a particular case, may be and gen-

erally are widely different. Each is required to exercise that degree of care in the performance of his duty which a reasonably prudent person would use under like circumstances; but the circumstances in which the master is placed are generally so widely different from those surrounding the servant, and the primary duty of using care to furnish a reasonably safe place for others is so much higher than the duty of the servant himself in a case where the primary duty providing a safe place or safe machinery rests on the master, that reasonably prudent person would ordinarily use a higher degree of care to keep the place of work reasonably safe, if placed in the position of the master who furnished it than if placed in that of the servant who occupies it."

So in the case at bar in considering the question of contributory negligence, the court must consider all the surrounding circumstances viz: The custom of passengers to open the door. The fact that on other occasions when the door had been opened the bar was up; the knowledge on the part of petitioner's and appellant's employees that the bar was not up; the lack of knowledge of that fact on decedent's part; and finally, the higher degree of care and greater responsibility imposed upon petitioners and appellants.

ANALYSIS OF APPELLANT'S ARGUMENT ON CONTRIBUTORY NEGLIGENCE.

Counsel for appellant in his brief has used a very ingenious argument in trying to prove that Early, the deceased, was guilty of contributory negligence. He

picks out one particular isolated fact or circumstance in connection with Early's death. He calls that a factor. He then proceeds to cite other cases wherein that particular factor was present, and wherein the court found contributory negligence. He ignores other facts and circumstances of that particular case. He then picks out another factor of the Early case and does likewise, and so on until he has found that in all of the factors of the Early case, as thus selected by him, have likewise been factors in some other case or cases wherein the court has found contributory negligence. He utterly ignores that portion of the case that takes it entirely out of the realms of contributory negligence, and then he reasons, that as the Early case is equal to the product of factors, as adroitly arranged by counsel, and each factor has been held to be a factor in making up a contributory negligence in some other case, though the facts were altogether different there, therefore there must have been contributory negligence by decedent in the case at bar. This may be good mathematics, but, is poor law. Negligence whether contributory or otherwise is never absolute. It is not founded on any rule of law. It is always relative, and is to be determined **from the surrounding circumstances of each particular case.** The trial court has found that.

“The said George D. Early, now deceased, did
“not open the door at the place where he fell through
“and he did not contribute in any degree to the lack
“of protection at said place in said ferry-boat occa-
“sioned by the lack of said bar.” (Trans. 296) And

again the trial court finds “and her said passenger “George D. Early was drowned by reason of said “carelessness and negligence,” (Trans. 296). These findings are amply sustained by the evidence, and certainly both of these findings, negative contributory negligence; and certainly the trial court is always in a better position than the appellate court to determine a question of this kind. The trial court in this particular instance was in a position to determine this particular question with unusual certainty. The court on motion of counsel for appellant, and at his request, was taken to the steamer “Antelope,” and there at the open doorway in the presence of the court and both counsel, and the President of the Coggeshall Launch Company, the witness, Joseph Whelihan, Emmett Whelihan and Alva Moss, took the same position assumed by them at the time of the accident. The spot where Early stood before approaching the door; His position when pushing the door; His position in falling through the doorway were all pointed out to the court, and told more clearly than volumes of written testimony could tell of, **all the surrounding circumstances**. And in the light of all the evidence and surrounding circumstances the trial court found that there was no contributory negligence.

For the appellate court to find contrary to the trial court, would require a great preponderance of evidence. But there is no such weight of evidence to show contributory negligence on Early’s part,—

Counsel urges that Early's contributory negligence consisted in

- (1) Assuming a dangerous position.
- (2) In failing to use his faculties.

His assuming a position which counsel calls "dangerous" was not a negligent act on Early's part, for as we have before pointed out the position which he assumed was safe had the bar been in place, and Early had a right to assume that it was in place. The trial court set forth that fact very clearly in its written opinion in the following language at page 285 of the Transcript.

"Nor can it be said that the mere approach of de-
"ceased to the opening already made by others was
"negligent, as he had every reason to suppose that
"there was no danger in so doing, for at all times
"theretofore the bar had been in place. Nor was he
"bound **under all the circumstances** to assure him-
"self that the bar was not in place at that time, be-
"cause he was bound only to the exercise of such
"care, as an ordinary prudent person would have ex-
"ercised under the circumstances. He could not an-
"ticipate and was not bound to anticipate that the
"vessel had left Samoa with this doorway unpro-
"tected. He with the other passengers had become
"so accustomed to the presence of the bar that he
"had no reason to suspect that it was not in place, as
"indeed, there is no good reason for it not being in
"place."

(2) FAILURE TO USE HIS FACULTIES

Counsel on page 44 of his brief states his proposition in these words:— He (meaning Early) either saw and disregarded or heedlessly failed to see that there was absent from its accustomed place, a bar," etc. Counsel does not make it clear which one of these conditions he claims to have proved. Has he proved that Early failed to see and note the absence of the bar? No. Has he proved that Early heedlessly failed to see? No. He must accept and prove either one proposition, or the other for it is evident that both could not exist. Contributory negligence is an affirmative defense and the burden is upon him who asserts it.

Counsel then proceeds to cite decisions, every one of which is a case in which the injured person should have exercised and used his faculties, and failed to use them. Most of them are elevator cases wherein the injured person **walked** into danger. But in the case at bar there is absolutely no evidence to show whether Early did or did not see and note the absence of the bar, and no one could know that fact except Early himself. If he did see and note the absence of the bar then this falling overboard was due, either, to a lurch of the vessel, there being no bar in place to protect him; or, the sudden giving away of the door against which he was pushing, there being no bar in place to protect him. It is hardly reasonable to suppose, and we do not suppose counsel would contend that he purposely walked through

the doorway, after he observed it to be unprotected, and intentionally fell backwards into the water. If he did not observe the absence of the bar, then his falling may have been caused by either of the causes mentioned above, or by his attempting to lean upon the bar, supposing, as he had a right to suppose, it had been put in place.

The point we wish to make clear is, that there is no evidence as to whether Early did or did not use his faculties. Contributory negligence is an affirmative defence and the burden of proving it is upon the one who offers it as a defense, and certainly it is not proved in this case. The conclusion to which the trial court arrived is probably correct. He says (Page 285 Trans.)

“From all the surrounding circumstances I am
 “compelled to the belief, that with his attention fixed
 “on the door which had stuck, he approached it with
 “his side to the doorway, without observing or paus-
 “ing to observe its unprotected condition, but rely-
 “ing on the fact that the bar had always been in
 “place. It was between five-thirty and six o’clock in
 “the evening of Jan. 15th, and while not yet dark, it
 “was not wholly light. And though an examination
 “would have disclosed to him the absence of the pro-
 “tecting bar, his failure to make such examination,
 “having in view **all of the circumstances**, can neither
 “excuse such absence, nor charge him with such de-
 “gree of negligence, as to relieve petitioners from re-
 “sponsibility.”

CONCLUSION OF SUBDIVISION

In conclusion permit us to say, that in the case at bar, the appellant discovered and knew, or ought to have known, the exposed situation of the decedent Early, and appellant could have avoided injuring him by the exercise of even ordinary care. And that under such a state of facts

“The courts are almost universally
“agreed that, notwithstanding the fact that
“the plaintiff or the person injured **has been**
“**guilty of some negligence in exposing his**
“**person to an injury at the hands of the de-**
“**fendant**, yet if the defendant discovered
“the exposed situation of the person, in
“time, and by the exercise of ordinary or
“reasonable care could have avoided the in-
“jury, and nevertheless failed to do so, **the**
“**contributory negligence of the plaintiff or**
“**of the person injured**, does not bar a recovery of damages from the defendant.”

Island &c. Co. vs Polson, 139 U. S. 551
Omaha Street R. Co. vs. Cameron 43
Neb. 297

61 N. W. Rep. 606

Krenzer vs. Pittsburg R. Co. 151 Ind.
592

12 Am. & Eng. R. C.
U. S. 343

5 Am. Neg. Rep. 173

43 N. E. Rep. 649

Neet vs. Burlington R. Co. 106 Iowa 248

5 Am. Neg. Rep. 26

Ford vs. Chicago R. Co., 106 Iowa 85
Baltimore Traction Co. vs. State 78 Md.
409.

Kirtly vs. Chicago R. Co., 65 Fed. Rep.
386

Thompson vs. Salt Lake R. T. Co., 16
Utah 281

40 L. R. A. 172

McLamb vs. Bangor R. C., 91 Me. 399

40 Atl. 67

“Although the death or injury of a per-
“son may be immediately produced by his
“own act,—yet if this act was the necessary,
“legal, or natural consequence of the ori-
“ginal wrongful act of another person, that
“other will be answerable in damages for
“it.”

Jones vs Louisville R. Co., 82 Ky. 610

Fowler vs. Baltimore R. Co., 82 W. Va.
579

The great weight of decisions hold, that in cases like the one at bar, the question of contributory negligence is one to be passed upon by the jury or the court sitting as a trial court. And where the trial court has heard the evidence and found the facts, the rule is

“The decision of a trial court in admir-
“alty upon questions of fact, based on the
“conflicting testimony of witnesses exam-
“ined before the judge, will not be reserved
“on appeal, unless there is a decided pre-
“ponderance of evidence against it.”

- Memphis, etc., vs. Hill 122 Fed. 246
58 C. C. A. . .10
- Whitney vs. Olsen, 108 Fed. 292
47 C. C. A. 331
- Alaska, etc. vs. Domenico, 117 Fed. 99
54 C. C. A. 485
- Paauhan, etc., vs. Palapala 127 Fed. 920
62 C. C. A. 552
- Baton Ronge, et .cvs. George 128 Fed.
914
63 C. C. A. 640
- Bakeer, etc. vs. Neptune Etc. 120 Fed.
247
56 C. C. A. 82
- Jameson vs. Lewis, 131 Fed. 728
65 C. C. A. 586
- The Columbian, 100 Fed. 991
41 C. C. A. 991
- Elpricke vs. White, etc., 106 Fed. 945
46 C. C. A. 56
- The Anaces, 106 Fed. 742
45 C. C. A. 596
- City, etc. vs. Chrisholm, 90 Fed. 431
33 C. C. A. 157
- The Edward Smith, 135 Fed. 32
67 C. C. A. 506
- The Newport News, 105 Fed. 389
44 C. .C.A 541
- The Svealand, 136 Fed. 109
69 C. C. A. 97
- The Oscar B., 121 Fed. 978
58 C. C. A. 316

Perrians vs. Pac. Coast Co., 133 Fed. 140

66 C. C. A. 206

Where the final condition of the record is in accordance with the substantial rules of the law, a court of admiralty does not look at the intervening steps.

The S. L. Watson, 188 Fed. 945

55 C. C. A. 439

When no new testimony is offered on appeal, the circuit court will not hastily disturb a decree on the point of damages nor unless it shows manifest injustice.

Cushman vs. Ryan, Fed. Cas. No. 3, 315.

1 Story 91.

The Lord Derby, 17 Fed. 265.

The rule is well settled in courts of admiralty that the decision of the trial court, which heard the witnesses, on questions of fact, will not be disturbed by an appellate court, unless clearly against the weight of evidence.

The J. G. Gilchrist, 183 Fed. 105.

105 C. C. A. 397.

12th SUBDIVISION.

THE SEVENTEENTH ASSIGNMENT OF ERROR.

The assignment is, that the court erred in sustaining the objection to all the evidence introduced by claimant.

That this assignment is without merit is clearly apparent.

13th SUBDIVISION

THE EIGHTEENTH ASSIGNMENT OF ERROR.

This assignment is as follows:

“That the said District Court erred in
“not rendering judgment for petitioner
“Coggeshall Launch Company on the plead-
“ings.”

Appellant discusses this assignment on pages 9, 10, 11, 13, and 14 of his Brief.

THERE WAS NO MOTION MADE IN THE CASE FOR JUDGMENT ON THE PLEADINGS.

Search the Transcript of the Apostles as carefully as you may, and you cannot find wherein appellant ever made a motion **for judgment on the pleadings.**

True it was argued by appellant; and the court assumed there was such a motion and denied it; yet **in fact there was never any such a motion actually made.** In California the rule is that

“Judgment on the pleadings cannot,
“however, be properly rendered where the
“answer denies any material allegation of
“the complaint.”

84 Cal.	476
50 Cal.	619
34 Cal.	39
51 Cal.	526
64 Cal.	24
60Cal.	428

THE ANSWER AND CLAIM.

The answer and claim are in proper form. The answer is found on pages 47 to 52, and the claim on pages 328 to 336 of the Transcript of the Apostles on Appeal. The reason why the claim appears in the back part of the Trans. of the Apostles, is, that the original was mislaid in some way, and it was necessary to file a copy of the original nunc pro tunc. See stipulation on page 335 of the Apostles on Appeal.

An examination of the answer, will show that it conforms to all the requirements of the Rules in Admiralty. The allegations of the petition that are not admitted are specifically denied. And then, the answer proceeds to allege in apt words and proper form the negligence of the appellant, and showing wherein it was negligent, and that such negligence resulted in the death of claimant intestate. And then the answer prays, among other things, "for such other relief as to the court may seem meet in the premises."

The allegations, averments and prayer of the answer are sufficient.

The claimant has pleaded a good cause for negligence in her answer. And she has proved the same.

Appellant does not deny that the Claim states a good cause of action. But then he asserts that the claim is no part of the pleading.

In this, counsel is in error. The answer and claim may be stated together in one instrument, or they may be separately stated. In other words, the

claimant on filing his claim becomes an actor; and if there are several claims filed

“Each claim is treated as a distinct proceeding, in the nature of a several suit, on “which there may be an independent hearing, decree, or appeal.”

Stratton vs. Jarvis, 33 U. S. 4

8 L. Ed. 846

REPLY TO PETITIONER'S POINTS AND AUTHORITIES.

As to the answer not being sufficient.

No exceptions to the answer and claim were filed; hence the attacks made by the appellant in its brief have no force.

I.

Strict and technical formality is not required of the answer but it must set forth the matters relied on, otherwise an exception for insufficiency will lie to compel a further and better answer. (The California 1 sawy. (U. S. 463.)

The petitioners having failed and neglected to file exceptions to the answer and claim of the claimant herein, they cannot now by argument only, attack the same. We must then consider the matters and things alleged in the answer and claim as confessed by the petitioners. Therefore the rule laid down in the case of *In re Starin*, 173 Fed. Rep.-721 has no application to the case at bar. In the cause cited the court says on page 721.

“To this answer certain exceptions have been filed to the effect that the answer is indefinite and insufficient, in the sense that it does not state in what particular or particulars the steamer was unfit to successfully encounter and navigate, in what she was weak, and in what she was unseaworthy, or deficient in fittings, so as to successfully withstand the sea.”

(At conclusion p. 723).

“The exception will be sustained, and the claimant ordered to make his allegations of fault more definite.”

As there were no exceptions filed to the answer and claim of the Claimant the rule laid down In *Re Starin* has no application here. Further, the Answer and Claim in the case at bar were full and sufficient disclosing clearly the fault and negligence of Appellant.

The Appellant cites the case of *In Re Davidson S. S. Co.* 133 Fed. Rep. 411. In that case, like in the case of *In Re Starin* supra. the petitioners filed exceptions to the Answer and Claim of the Claimant upon several grounds, and the exceptions were sustained on the grounds of the insufficiency thereof.

In the cause of the *In Re. Marquette*, 203 Fed. Rep. 127, cited by appellant, there was also exceptions filed to the Answer and Claim, which exceptions were also sustained. As these cases cited pass upon matters, not raised by the pleadings in the case at bar, they have no application here.

The latter case however might be cited as an

authority in support of the Claimant's pleadings; for the court says at page 130:—

“The issues, being thus distinct, must be set out in separate pleadings.”

The answer and claim of the claimant are set out in separate pleadings and are therefore in harmony with the rule laid down in 133 Fed. 411.

In the case of John H. Starin, 175 Fed. 527, the same state of facts are presented as in the former decision of the same case in 173 Fed. 721. For these reasons the decision in the Starin case has no application here.

II.

Claimant has clearly and conclusively shown that the doorway was left unprotected, because the appellant were in violation of the law, rules and regulations, operating the vessel one man short, and that by reason thereof there was no one to see to it that the bar was put in place, which United States authorities required the appellant to keep in place.

III.

We have no quarrel with rule laid down in *Deslous vs. La Compagnie etc.*, 210 U. S. 95, 52 L. E. 973; and *In Re Eastern Dredging Co.*, 159 Fed. 541.

“Strict and technical formality is not required in the answer.”

New Haven Towing Co. vs. New Haven,
116 Fed. 762.

The Alexandria, 10 Fed. 904.

The Aldabaran, 1 Fed. Cas. No. 150.
The Nevaro, 17 Fed. Cas. No. 10,059.
The Pilot, 10 Fed. Cas. No. 11,168.

“If no exception is taken the reading of testimony cannot be objected to on the ground of the insufficiency of the answer.”

The California, 4 Fed. Cas. No. 2,312.
The Rocket, 20 Fed. Cas. No. 11,975.

“Exceptions should state in clear and definite terms the particular ground on which they are based.”

The Active, 1 Fed. Cas. No. 33.
The Schooner Navorso, 17 Fed. Cas. No. 10,059.

“A general exception as to the form of allegations will not be allowed. It should specify, briefly but clearly, the points excepted to.”

The Dictator, 30 Fed. Cas. No. 699.

“Exceptions not insisted on at the opening of the trial will be waived.”

Aumach vs. The Queen, 2 Fed. Cas. No. 657a.

White vs. Cynthia, 29 Fed. Cas. No. 17,546a.

“After testimony has been taken on the part of the claimant, without exceptions to the answer, the libelants cannot object at the hearing to the reading of the testimony on account of the insufficiency of the Answer.”

The Rocket, 20 Fed. Cas. No. 11,975.
1 Biss. 354.

“Objection too late on argument.”

The City of Carlisle, 29 Fed. 807.
5 L. R. A. 52.

14th SUBDIVISION.

THE REPLY TO APPELLANT'S CONTENTION OF ITS NON-LIABILITY.

The argument of counsel for appellant is ingenious in the extreme.

Let us analyze his conclusions found on pages 65, 66 and 67 of Appellant's Brief. Counsel say:

“1. “It was not dark though not wholly
“light. One could see the bar. (Wheelan
“vs. Gas Light Co., Supra.)”.

That one could see the bar is an assertion not supported by the evidence. Joseph Whelihan testifies:

“Q. Upon this evening could you see that the bar was up?

“Ans. I seen that it was not up. I did myself, “but George (deceased) never looked for it.” (Trans. 131 at bottom of page). The testimony of the witnesses is that it was quite dark, though not wholly dark, nor was it wholly light. It was so dark that some of the witnesses could not see Early while floating in the water and before he sank. And it must have been so dark that Early could not readily dis-

tinguish whether the bar was in place or not.

In the case of *Wheelan vs. Gas Light Co.*, the opinion states "It was bright day about 11 o'clock in the forenoon."

The facts are not parallel. In the *Whelan* case the obstacle could be readily seen; while in the case at bar, the fact that the barrier (the bar) was not in place, by reason of the growing darkness, could not be readily seen—therefore under the facts in the case *Early* was not afforded the opportunity of using his faculties.

"2. The factor whose absence caused the
"accident was large and situated well with-
"in easy vision without looking at one's
"feet. (*Quirk vs. Siegel-Cooper Company*,
"supra)."

This case, reported in 60 N. Y. Supp. at page 228, states the law favorable to claimant.

"3. The absence of the bar could easily
"have been seen if *Early* had looked.
"(*Day vs. Cleveland C. C. & Lt. R. Co.*, Su-
"pra.) or if he had paid the slightest at-
"tention (*Ballou vs. Collamore*)."

The case of *Day vs. Cleveland etc.* 36 N. E. 854, is not in point for in this instance there was nothing to obstruct the view of plaintiff, and further in the *Day* case the master had provided his employee with a safe place to work, and the improper placing of the running board was a danger incident to his employment. So in the *Ballou* case, the absence of the elevator could be readily seen.

“4. There was nothing to obscure Early’s
“vision. (Whalen vs. Gas Light and Co.,
“Supra.).”

This is an erroneous statement, for the evidence shows that while it was not quite dark yet it was not wholly light, and such in substance was the finding of the court, which is fully sustained by the evidence.

“5. Early first approached the doorway
“after observing his companions partially
open the door.”

A very natural thing for him to do, in view of the fact that theretofore the protecting bar had always been in place; and it was too dark for him to readily notice whether or not it was in place. He had the right to assume appellant had performed its duty by putting the bar in place as directed by the United States Inspectors.

“6. Early shoved on the door near the point
“where the bar would be if up.”

Yet his sight was not directed toward the point where the bar would be if up. His left side was toward the opening, and he used his left arm, holding his dinner-pail in the right. Naturally his eyes would be directed toward the side of the opening at the sliding door, and not toward the place where the bar should have been. He had the right to assume and believe the appellant had performed its duty and put the bar in place. Evidently that is what he believed and thought, for in attempting to lean against the bar he fell backward into the water.

“7. Nothing distracted Early’s attention
“any more than deceased’s attention was
“distracted in the Donohue vs. Bioof case.”

This case is not in point as there is no similarity in the facts. In that case the room was well lighted, and the bar-keeper shouted to him—“Don’t go out that way.”

“8. The opening was perfectly apparent.
“(Gray vs. Seigel-Cooper Co. Supra.).”

This case, 79 N. Y. Supp. 813, is not in point. There is no similarity of the facts in any particular. The reading of the opinion clearly demonstrates that it cannot be used as an authority in the case at bar. The deceased in that case went to a place where he should not have gone, and the place was lighted so he could have seen the danger.

“9. Early’s companions all saw that the
“bar was down. (Sparks vs. Siebrecht, Su-
“pra.).”

This case reported in 45 N. Y. S. 993, is not in point for in that case the facts were that

“the room was light and there was no dif-
“ficulty in observing the open unguarded
“trap door.”

While in the case at bar, it was not light, in fact it was nearly dark. The rule of law laid down in Sparks vs. Sibrecht, supra, has no application to the facts in the case at bar. For in that case the room was so light that she could have readily seen the danger. “No one could pass without seeing the opening.”

“10. Early approached a doorway leading

“to a dangerous place with his back to it on
“an occasion where the protection usually
“present was not up, and failed to look.
“(Brudie vs. Renault Freres Selling Branch
“Inc., supra.).”

The facts in the case cited are nothing like the facts in the case at bar. No legal duty was imposed on the defendant. **The place** Early backed into was made dangerous only because appellant's negligence made it so. The negligence of appellant constituted a violation of a legal duty imposed on it. Early had always seen the protecting bar in place, and he had come to rely on its protection, and the right to rely upon its being there as usual. The open doorway was safe had the bar been there, and it was too dark for Early to readily distinguish whether it was there or not.

Hanley vs. Eastern etc., 109 U. E. 168.
“11. There was no statement that he (Early) looked or if he had looked there was
“any physical reason why he could not have
“seen that bar had been moved. In the absence of any such showing the Court must
“assume that ‘to look was to see’ and that
“if he had looked he must have noticed the
“danger (Kauffman vs. Machin Shirt Co.,
“supra.).”

A comparison of the facts in the Kauffman case (167 Cal. 506) with the factors in the case at bar, clearly shows that it has no application here. In the Kauffman case, the court says

“There is no statement that if he had
“looked there was any physical reason why

“he could not have seen that the elevator
“had been moved.”

While the facts in the case at bar are, that it was growing dark, and naturally Early could not through the gathering gloom, well see whether the bar was in place or not.

The case of *Gilfillan v. German etc.*, 106 N. Y. 601, is not in point for the reason that the facts are not in accord with the facts in the case at bar. A reading of the opinion will sustain our contention.

The last case that counsel cites in his conclusions is *Larned v. Vanderlude*, 131 N. W. 165. The facts there do not fit in with the facts in the case at bar, therefore it is not authoritative in sustaining appellant's contention.

IN CONCLUSION; THE SAME DEGREE OF CARE is not required in elevator cases when the party injured is not a passenger, AS WOULD BE REQUIRED, IF HE WERE A PASSENGER WHEN INJURED.

THE APPELLANT URGES:

1st. “That the carrier owes to the passenger
“only a high degree of care.”

And to support that contention appellant cites the cases of

Elder Etc. v. Pouppirt, 129 Fed. Rep.
732.

The City of Boston, 159 Fed. Rep. 261.

Pratt v. North German etc., 184 Fed
Rep. 303.

These authorities do not sustain the appellant's contention hereinbefore quoted. The correct rule is laid down in the case of the New York C. R. Co. v. Lockwood, 84 U. S. 357, 21 L. Ed. 627, viz:

“Where carrier undertakes to convey
“passengers by the powerful and dangerous
“agency of steam, public policy and safety
“require that they should be held to the
“greatest possible care and diligence.”

Appellant cites the San Pedro (Boston etc. v. Lumber Co., 197 Fed. 703), a vessel which went to sea one man short contrary to regulations. A collision occurred by which injury occurred. That case has no application here, because in that case the shortage of one man had no connection with the collision, WHILE IN THE CASE AT BAR the shortage of the man was the producing cause of the injury. Also, in the other cases cited on this point by counsel, the facts bring them under the exception rather than within the rule.

The true rule is tersely stated in McKune v. Santa Clara etc., 110 Cal. at page 486, to be

“That the failure of any person to perform
“a duty imposed upon him by statute or **legal authority**, is sufficient evidence of negligence has been repeatedly declared by
“the court.”

(Siemers vs. Eisen, 54 Cal. 418; Driscoll vs. Market Street Ry. Co. 97 Cal. 553, 33 Am. St. Rep. 203). “But the principal has this

very obvious limitation. The act or omission must have contributed directly to the injury, or, however improper or illegal it may have been in the abstract, no action for damages can be founded upon it.”

2nd. On the question of decedent taking a dangerous position, counsel cites 85 Fed. 611, 125 Fed. 732, 45 N. Y. S. 728, 19 L. R. A. 487. These cases have no application. The rules there laid down do not fit the facts of the case at bar. Early did not take a dangerous position. The position was safe, had the bar been there, as required by the legal authorities, and the duty appellant owed to his passengers.

The rules laid down in 23 L. R. A. 758; 21 N. E. 311; 75 Pac. 212; 2 L. R. A. 83; 85 N. M. 149; 39 Fed. 596, 180 Fed. 495; 163 Fed. 662 and 155 Fed. 364, bearing on the question of the closed door, have no application, because in the case at bar there was a custom of opening the door.

CONCLUSIONS.

(1) Petitioners violated a statute by running one man short.

(2) This was the direct cause of the failure to put the bar in place, which in turn was the cause of the accident.

(3) Either or both of these constitute negligence for which the company is liable.

The first is negligence per se. The second the omission to perform a duty which the company clearly owed the passengers.

(4) The opening of the door was not a cause of the accident, because viewed in the light of the known custom it was merely an occasion or condition which should have been foreseen.

(5) There was no contributory negligence nor assumption of risk. Early could not assume a risk of which he had no knowledge; and his act in pushing on the door was not a negligent act, viewed in the light of the usual custom of opening the door, and the legal requirement and usual custom to have the bar in place. There is no evidence to sustain appellant's contention that he failed to use his faculties. He may have observed the absence of the bar and been precipitated through the door by force.

We respectfully submit that

“Where the final condition of the record is in accordance with the substantial rules of the law, a court of admiralty does not look at the intervening steps.”

The S. L. Watson, 118 Fed. 945.

55 C. C. A. 439.

And for the further reason that the findings of the Hon. District Court are fully sustained by the evidence, we submit that the judgment and decree appealed from should be affirmed.

Respectfully submitted,

W. ERNEST DICKSON,

Proctor for Appellee.

No. 2975

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

3

COGGESHALL LAUNCH COMPANY
(a corporation),

Appellant,

vs.

ELIZA A. EARLY, claimant,

Appellee.

APPELLANT'S PETITION FOR A REHEARING.

CLARENCE COONAN,

Eureka,

NAT SCHMULOWITZ,

San Francisco,

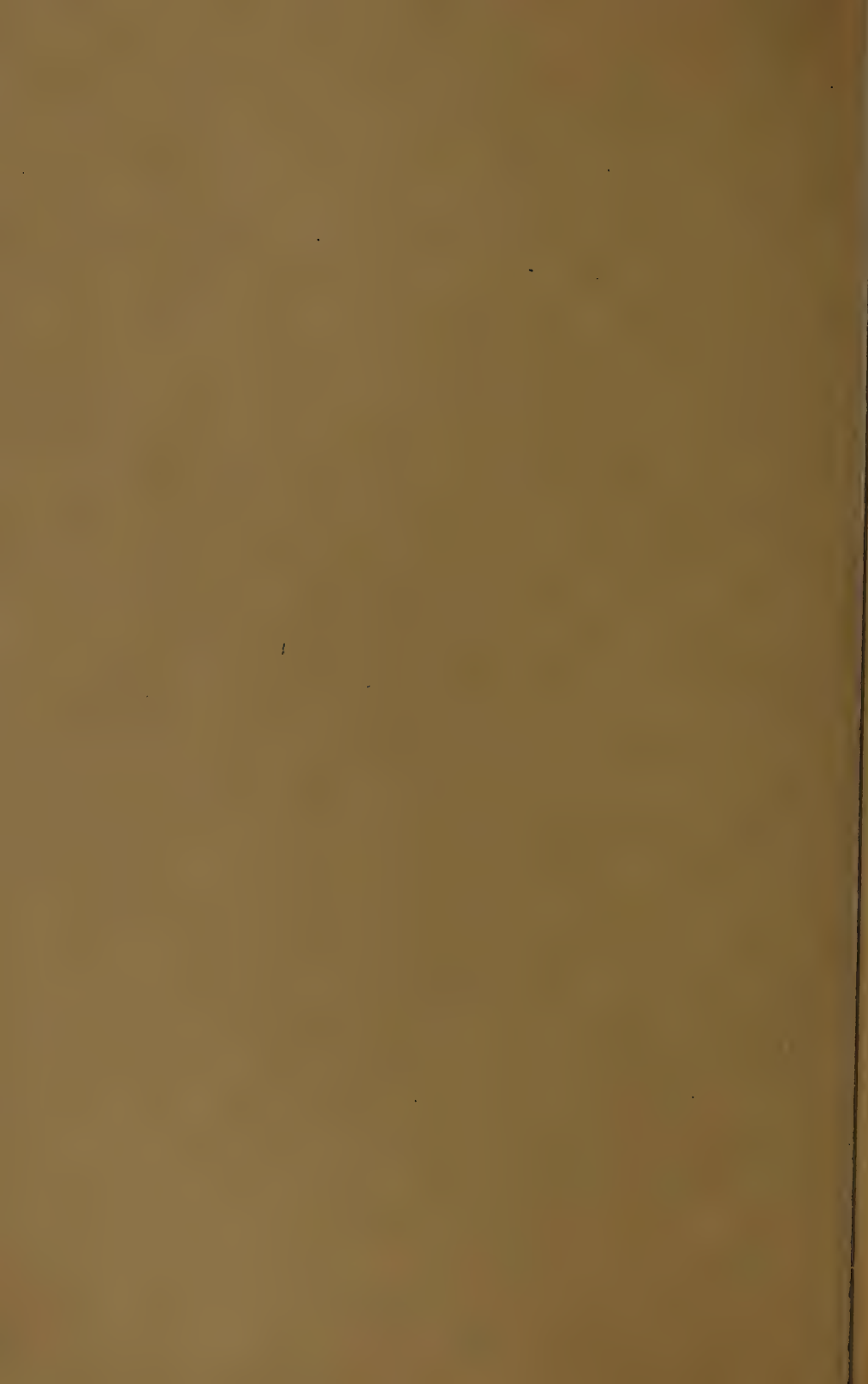
*Proctors for Appellant
and Petitioner.*

P. H. RYAN,

Eureka,

Of Counsel.

FILED
MAR 26 1910



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IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

COGGESHALL LAUNCH COMPANY

(a corporation),

Appellant,

vs.

ELIZA A. EARLY, claimant,

Appellee.

APPELLANT'S PETITION FOR A REHEARING.

To the Honorable William B. Gilbert, Presiding Judge, and the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

The appellant, Coggeshall Launch Company, respectfully asks a rehearing in this case, that further consideration may be given to a point which we apprehend has been misconceived by the court and to two other points, not considered by either this court or by the District Court, and which we believe should be considered.

The three points to which reference is made are:

1. Does not the evidence herein disclose contributory negligence?

2. Does not the evidence herein disclose a situation where there should be an apportionment of damages between appellant and appellee?

3. Does not the evidence herein disclose a situation showing negligence in Emmett Whelihan and Alva Moss and should there not on that account be a diminution of the appellant's damages?

I.

THE EVIDENCE HEREIN DISCLOSES CONTRIBUTORY NEGLIGENCE.

This question was fully discussed in the Appellant's Brief (pages 37-67 incl.) and it is not our desire to make an extended argument upon the same. However, there are certain phases of this subject not fully discussed in the brief and in order to place this court more fully in possession of our theory of the law of contributory negligence, it is necessary to discuss the same to some extent.

Contributory negligence may be defined as negligence of plaintiff which together with the negligence of the defendant causes an injury to plaintiff. It is not susceptible to a precise rule covering any situation but may be defined as a failure by plaintiff to act as an ordinarily prudent man would have acted under the same circumstances. In the instant case it is our contention that Early did not act as an ordinarily prudent man; that he did not exercise the same amount of care for his safety

on the evening of the accident as an ordinarily prudent man would have exercised. The proofs of this contention are two: one, the extent to which Early used his senses on the occasion in question; second, the experience of other men in the same position as Early on that same occasion.

In regard to the first basis of the contention: Physical activity of a human being, can only result from acquisition of knowledge and the judgment made from such knowledge. In the case at hand we do not know what knowledge Early acquired. We only know, that if he did acquire knowledge of the unusual danger by the bar not being in place, he was guilty of negligence in placing himself in a dangerous position. The question is then: Did he acquire knowledge? This question may be broadened and the law still be satisfied—Did he acquire knowledge of the danger, or was a situation presented where an ordinarily prudent man would have acquired knowledge of the danger? In either case his conduct would have been negligent. No one can state that Early did or did not actually acquire knowledge of the dangerous condition of the porthole, as no evidence is adduced on this subject; but we can investigate the surrounding facts and state whether an ordinarily prudent man would have seen the danger.

Knowledge is acquired by human beings through the senses. We are aware, we know, because of sensory impressions communicated to our brains. In the instant case because we do not actually know

whether or not Early noticed the absence of the bar, our investigation concerns itself with the number of sensory impressions the ordinarily prudent man would have received if he had been in Early's place and whether these impressions would have given the ordinarily prudent man knowledge of the absence of the bar.

The evidence of the observability of this factor, to wit, the absence of the bar, all adduced by witnesses for claimant, is as follows:

Early had been a daily passenger on the "Antelope" for five years. On the evening of the accident prior to the opening of the door he was standing on the lower deck of the "Antelope" three feet from the doorway. He saw his companions open the door, and he saw the door stick when it was open about 6 or 6½ feet, and while there was 1½ to 2 feet of the doorway still barred by the door, Early went to the door and assisted in completing the work of fully opening it. Then Early fell overboard. It appears that at one time three persons, Early being one, were pushing on the end of the door and that the place for the bar was about an inch outside of the door. The bar was about 8 feet long and 6 inches wide and when in place was about 3 feet from the deck. It was not dark, though not wholly light (see pages 39 to 45 of Appellant's Brief which sets forth the evidence more fully).

With these facts in view the trial court in its opinion states:

“From all the surrounding circumstances I am compelled to the belief that with his attention fixed on the door which had stuck, he approached it with his side to the doorway without observing or pausing to observe its unprotected condition, but relying on the fact that the bar had always been in place” (Apostles p. 285).

The excerpt contains the nearest approach in the trial court’s opinion of any consideration of the observability of the unprotected condition of the doorway. There is no statement in the opinion as to what an ordinarily prudent man would have seen, or what Early should have seen; and the question now before this court, is not what Early observed, but what, in the use of his senses, he should have observed. Furthermore, there are no surrounding circumstances,—there is no proof that Early’s attention was fixed on the stuck door, that all other matters were excluded from his mind, nor that he approached the door with his side to the ship and that he failed to observe or paused to observe the condition of the doorway. The evidence gives us no information as to the extent or direction of Early’s attention as he approached the doorway or how he approached the door or his knowledge of the dangerous condition of the door; he may have known of its unprotected condition and he may not have known.

But the evidence does tell us:

1. That it was light enough to notice the absence of the bar (Apostles pp. 152, 131, 141).

2. That the bar was not a small object, the absence of which would naturally be unnoticed but was large, being about 8 feet long and 6 inches across (Apostles pp. 82, 116).

3. That the position of the bar when in place was not near the deck and below the line of vision, but was about 3 feet above the deck (Apostles p. 82).

4. That Early approached the opening, as he must have done to approach the door (Apostles pp. 156, 102, 122).

5. That Early actually pushed on the door between his two companions (Apostles pp. 117, 134, 135, 136) and must have been near the actual opening occasioned by opening the door in the absence of the bar.

Under these facts, established by claimant's witnesses, is it possible that the ordinarily prudent man would not have noticed the absence of the bar and the danger present therefrom? The evidence is, there was light enough to see; that the bar was large, and near the range of vision so its absence would be easily noticed; and that Early actually shoved on the door from a point very near the place where the bar should have been. Certainly if Early did not observe the absence of the bar, must he not have been conscious of its absence by virtue of the fact that three persons, himself included, pushed on the end of the door without the accompanying awkwardness which would result

from the presence of a bar an inch outside of the point where their hands were shoving? The trial court has not discussed these factors in its opinion, which factors other courts have considered, and have held that they were factors of the observability of the danger, and of contributory negligence. These cases are considered in Appellant's Brief. Petitioner hereby refers to pages 46 to 65 thereof as bearing out this statement.

The second consideration under this general subject of contributory negligence is the knowledge of others as to the condition of this doorway on the afternoon of the accident. Claimant called as witnesses four fellow-passengers of Early. Their names were Alva Moss, Joseph Whelihan, Emmett Whelihan and Otto Johnson. The three first named were intimate or close friends of Early (Apostles pp. 101, 126, 146). Moss it seems noticed the bar was down when he closed the door at Samoa (Apostles p. 106). Joseph Whelihan, Emmett Whelihan and Otto Johnson noticed the bar was down after the vessel left Samoa and before the accident; evidently, while the door was being opened (Apostles pp. 131, 152, 141). In discussing the question whether Early did notice the absence of the bar, or whether an ordinarily prudent man would have noticed the same, what consideration is to be given to the testimony of these four witnesses who did notice the absence of the bar? Should we arbitrarily set their testimony aside and say they are not ordinarily prudent men,

and that their observation of this fact stamps them as ultra-careful men? Should we view their powers of observation as extraordinary? There is no evidence that Moss, the two Whelihans or Johnson are to be thus categoried, and in consequence must be classed only as ordinary men with ordinary powers of observation and of ordinary prudence.

If that is true, how must we consider the conduct of Early, who either did have the same experience as the four witnesses and saw the bar was down, or who failed to notice what the others did notice? In one case Early was negligent in not using knowledge as an ordinarily prudent man. In the other case Early was negligent in not acquiring knowledge from factors which would have conveyed knowledge to an ordinarily prudent man.

It may be contended that Early's experience was different from the others—that his opportunities of acquiring knowledge were different. This is most likely true. The light conditions may have changed between the time Moss learned of the absence of the bar at Samoa, and the time of opening the door; Emmett Whelihan, who discovered the absence of the bar on opening the door (*Apostles* p. 152), may have a greater length of time in which to discover it; Otto Johnson's position may have assisted him in seeing the condition of affairs. But be that as it may, the fact still remains that conditions in general were similar and were dissimilar only in slight particulars.

Moreover the witness, Joseph Whelihan, whose experience as to position (Apostles pp. 120, 122) and presumably every other particular except in regard to approaching the door and assisting to open it, was similar to Early, discovered the bar was not up (Apostles p. 131). And the exception last referred to, to wit, that Early approached the door and helped to complete the opening of the door while Joseph Whelihan did not, gave greater opportunity of knowledge to Early than to Joseph Whelihan.

We have mentioned the factors bearing on the dissimilarity of opportunities of acquiring knowledge between Early and the four witnesses. There is no certainty that these factors weigh against Early's opportunity. On the other hand, it is certain that the majority of factors for gathering knowledge were afforded him, just as they were afforded the four witnesses. These factors were visibility, lack of obstructions, size of the absent bar, the position of the bar when in place, and the lack of awkwardness resulting from these men not confined by a bar while pushing.

II.

THE APPELLANT IS ENTITLED TO A DIVISION OF DAMAGES.

The rule of division of damages applies when both parties to an accident were negligent. This, therefore, requires an investigation of the follow-

ing: (a) Were both parties negligent in the instant case, and (b) does the rule apply to death case?

A. Both parties were negligent in the instant case.

There is no necessity of discussion on the question whether Coggeshall Launch Company, the appellant, was negligent. The court has found that to be the fact and has rendered a judgment accordingly.

However, there has been no judgment that Early was also guilty of negligence and in consequence we must ascertain that such is the fact or else the proposition of this topic falls.

In Appellant's Brief before this court, and in the present Petition for Rehearing, it has been strenuously contended by the appellant that Early was guilty of contributory negligence and that claimant's action should be barred on that account. The present argument is not directed toward contributory negligence which will bar claimant's action, but to any negligence, not sufficient to constitute a bar, but which should be considered in reference to the rule of division of damages.

The evidence referred to is, of course, the same evidence relied on in this petition seeking to sustain the contention that there was negligence by Early sufficient to constitute a bar to claimant's action. It is submitted that even if the evidence does not make out the defense claimed, it does show a degree of negligence on the part of Early and

should be considered in applying the rule for a division of damages. The contention that there is some evidence of negligence on the part of Early is borne out by the opinion of this court in affirming the judgment below. This court in its decision states with reference to the District Court judgment that "the court found the launch company was guilty of the negligence alleged against it, and that the deceased was not guilty of contributory negligence". Further on in the opinion this court further states that "We also agree with the court below that the facts and circumstances of the case were not such as to require or justify a finding of contributory negligence on the part of the deceased". The object of the petitioner in thus pointing out these two statements of this court's opinion is to call attention to the fact that these two comments are the only ones in the opinion referring to the subject, and that both merely state that this court agrees with the court below in its conclusions on the subject of contributory negligence. Further on in this court's opinion, however, there is incorporated a part of the discussion of the court below on this subject of contributory negligence. In this excerpt of the District Court's opinion we find this statement: "Though an examination would have disclosed to him (Early) the absence of the protecting bar, his (Early's) failure to make such examination, having in view all the circumstances, can neither excuse such absence, nor charge him with such

degree of negligence as to relieve petitioners from responsibility.” This statement, may it please the court, involves two conclusions; first, that Early’s conduct in view of the circumstances can not excuse the absence of the bar, and secondly, it is not sufficient to relieve petitioners from responsibility. The first conclusion relates to whether or not Early’s conduct was sufficient to excuse the company for failing to put in the protecting bar and Early’s conduct did not constitute an excuse and that there was negligence on the part of the company. The second conclusion is one which assumes the company’s negligence and states Early’s conduct did not relieve petitioners from responsibility; or in other words, Early’s conduct was not such, as to constitute a bar to the negligence, responsibility for which had been fastened on petitioners, and from which petitioners were seeking to be relieved.

The preceding discussion of the excerpt leads to the particular phrase in the same, which is susceptible of only one conclusion—“that the lower court did find some negligence”. The court in considering Early’s conduct concludes that it (Early’s conduct) did not charge him (Early) “with such degree of negligence as to relieve petitioners from responsibility”. The phrase does not state that Early had not been negligent at all. The inference is that he was negligent, but not to the extent that the negligence constituted a defense in bar to the action. The inference is

strengthened by the knowledge that there are different degrees of negligence, and also by the fact that it cannot be assumed that the court used the phrase in question needlessly, and without intention that it means exactly what it infers, to wit, that there was some negligence. If the court found there was no negligence it could have so stated in its opinion. It does not so state that there was no negligence but does state that there was not "such degree of negligence as to relieve petitioners from responsibility."

Assuming therefore that the situation presented discloses either that the question of any negligence has not been passed on, or if passed on, only considered in reference to it being sufficient in degree to constitute an absolute defense, it becomes necessary to discover the application of the rule of division of damages.

The rule of dividing the damages where both parties are at fault was first applied to collision cases only; afterward extended to all cases of maritime tort occasioned by concurrent negligence. See *The Max Morris*, 137 U. S. 1; 34 L. ed. 586.

It is stated in the text books that this rule, while applicable to ordinary personal injury cases has no application to injuries resulting in death. See I. C. J., 1327-1328; Sec. 238, 239, *Hughes on Admiralty*.

In the latter citation, *Hughes on Admiralty*, at page 208 it is stated that

“There is one anomaly in the decisions on the subject—

In personal injury cases, not fatal, the damages are divided, not equally, but much as the judge may think equitable, considering the circumstances and the relative fault of the parties.

In other words, in all other admiralty cases contributory negligence reduces recovery but does not defeat it. But in this case the rigid doctrine of the common law as to contributory negligence is applied.”

Bearing on this question there are certain statements of United States Supreme Court decisions to which we desire to call this court's attention. In the case of *The Max Morris*, 137 U. S. 1, 34 L. ed. 586, at page 588, the court states:

“But the plaintiff has elected to bring suit in an admiralty court, which has jurisdiction of the case, notwithstanding the concurrent right to sue at law. In this court the course of proceeding is in many respects different and the rules of decision are different. The mode of pleading is different, the proceeding more summary and informal, and neither party has a right to trial by jury. An important difference as regards this case is the rule for estimating the damage. In the common law court the defendant must pay all the damages or none. If there has been on the part of the plaintiffs such carelessness or want of skill as the common law would esteem to be contributory negligence, they can recover nothing. By the rule of the admiralty court, where there has been such contributory negligence, or, in other words, when both have been in fault, the entire damages resulting from the collision must be equally divided between the parties.

This rule of the admiralty commends itself quite as favorably in its influence in securing practical justice as the other; and the plaintiff who has the selection of the forum in which he will litigate cannot complain of the rule of that forum. This court, therefore, treated the case as if it had been one of a collision between two vessels.”

And at page 589:

“This principle, it is contended, is sanctioned by the language used by this court in *The Marianna Flora*, 24 U. S. 11 Wheat. 1, 54 (6:405, 417): ‘Even in cases of marine torts, independent of prize, courts of admiralty are in the habit of giving or withholding damages upon enlarged principles of justice and equity, and have not circumscribed themselves within the positive boundaries of mere municipal law’; and in *The Palmyra*, 25 U. S. (12 Wheat. 1), 17: (6:531, 536): ‘In the admiralty, the award of damages always rests in the sound discretion of the court, under all the circumstances.’ ”

And at page 589:

“All these were cases in admiralty, and were not cases of collision between two vessels. They show an amelioration of the common-law rule, and an extension of the admiralty rule in a direction which we think is manifestly just and proper. Contributory negligence, in a case like the present, should not wholly bar recovery. There would have been no injury to the libellant but for the fault of the vessel; and while, on the one hand, the court ought not to give him full compensation for his injury, where he himself was partly in fault, it ought not, on the other hand, to be restrained from saying that the fact of his negligence should not

deprive him of all recovery of damages. As stated by the District Judge in his opinion in the present case, the more equal distribution of justice, the dictates of humanity, the safety of life and limb and the public good will be best promoted by holding vessels liable to bearing some part of the actual pecuniary loss sustained by the libelant, in a case like the present, where their fault is clear, provided the libelant's fault, though evident, is neither willful, nor gross, nor inexcusable, and where the other circumstances present a strong case for his relief. We think this rule is applicable to all like cases of marine tort, founded upon negligence and prosecuted in admiralty, as in harmony with the rule for the division of damages in cases of collision. The mere fact of the negligence of the libelant as partly occasioning the injuries to him, when they also occurred partly through the negligence of the officers of the vessel, does not debar him entirely from a recovery”.

In the case of *Workmen v. Mayor etc., New York*, 179 U. S. 552; 45 L. ed. 314, at page 321, the court in commenting on *The Max Morris*, supra, states:

“This distinction is well illustrated by the ruling in the *Max Morris* (1890), 137 U. S. 1, 14, sub. nom. *The Max Morris v. Curry*, 34 L. ed. 586, 589; 11 Sup. Ct. Rep. 29. There it was asserted that by the universal principles of the common law, as well as of the local laws of the states, no right to recover for a wrong committed could be enforced in favor of one who had himself contributed to the producing cause of the injury, whilst the premise was conceded, the soundness of the inference deduced from it was denied, and it was held that as by the general principles of the maritime law a measure of relief would be afforded

to a person who had suffered a wrong, even although he had contributed thereto, it was the duty of the admiralty courts to grant relief in accordance with the principles of the maritime law”.

These decisions point out that in personal injury cases the plaintiff has an election of suing for the injury in admiralty or at law. Having elected to sue in the admiralty court, the parties are entitled to the rule of division of damages; having elected to sue in a law court, the parties are not entitled to the rule of division of damage. The decisions do not say that the admiralty court as such can and will apply either admiralty rules or law rules, but that, having jurisdiction of the case, it will apply the admiralty rule in question. Nothing is said in these cases about the application of the rule to death cases, but the text books above referred to, do state that in such actions the courts will not apply the rule. The cases cited by these text books do not sustain the statement. In the case of *Gretchman v. Fix*, 189 F. 716, one of the decisions cited by the text books decides at pages 718:

“In proceeding in admiralty for causing death by negligence the remedy is derived from the state Statute which gives the right of action to the next of kin, and concededly the common law doctrine of contributory negligence has application to the facts under consideration”.

And in the case of *Robinson v. Detroit etc. Co.*, 73 F. 883, another case cited by the text books, the courts state at page 894:

“It seems to be well settled by the law of England and by the law of this country that rights of action arising in admiralty under Lord Campbell’s act and similar acts are to be enforced according to the principles of the common law and that contributory negligence is a complete bar to a recovery.”

Again in *The A. W. Thompson*, 39 Fed. 115, also cited by text books at page 117:

“The action rests entirely upon the state statute. Any defense therefore that would bar recovery in the state court, with reference to which the statute must be deemed enacted must be held equally good in the admiralty.”

It is apparent that in none of these cases was the question of division of damages considered. The cases merely hold that if contributory negligence is present it will constitute a bar because the basis of the action being a state statute, any defense thereto under the state statute will be applied. The cases do not consider “such degree of negligence” which does not in view of all the circumstances constitute contributory negligence. They do not consider a situation where there was some fault on the part of the plaintiff not sufficient to constitute a bar to the action.

The only case in which the claim of division of damages in a death case seems to be discussed is the case of *In re Meyer*, 74 Fed. 881. This case was determined by the District Court for the Northern District of California. On page 896 the court states:

“The facts of this case do not bring the death of Robinson within the provisions of Section 4493, Rev. St. U. S., nor within the principles announced by the Supreme Court in *The Max Morris*, 137 U. S. 1, 8, 11 Sup. Ct. 29, where it was held that there being negligence established against the officers of the vessel, the libelant was not debarred from the recovery of any sum of money by reason of the fact that his own negligence contributed to the accident”.

The court seems to assume that the doctrine is applicable in death cases but not in the particular case considered. While the case is not satisfactory it does infer that the rule of division of damage extends to death cases.

In the case of *The Max Morris*, supra, the court, it is true, is considering a personal injury case where there are concurrent rights on action for the one injury; one based on common law tort and the other maritime tort. But there is nothing stated therein, nor in any other case we can find, that either of these actions can be prosecuted in the admiralty and that only the remedies peculiar to either, will be applied in an admiralty court. It may be such is the law, but the case does not so decide. The decision states that the plaintiff has a choice of forums, and having chosen the admiralty, the rules of admiralty, including division of damages, will be applied.

In the instant case the admiralty court has jurisdiction of the cause by virtue of a limitation of liability proceeding. Having that jurisdiction will the

mere fact that the claimant's right of action arises from a California statute make the admiralty rule of division of damages inapplicable? Perhaps that is the law, but if so, there seems to be no expression by a federal court. The extent of expression by federal courts decision in this regard is as contained in the cases cited above, where the absolute bar of contributory negligence is applied when the degree of negligence is sufficient to make out that defense. No consideration in a death case has ever been given of a claim of the admiralty rule of division of damages where the evidence does not disclose such degree of negligence as to make out the defense of contributory negligence. That there can be negligence, that there can be fault or blame not amounting to contributory negligence but sufficient to be considered in mitigation of damages has been determined in several jurisdictions.

Southern R. Co. v. Pugh, 97 Tenn. 624;
37 S. W. 555;

Dush v. Fitzhugh, 2 Lea (Tenn.) 307;

Jess v. Quebec etc. Ferry Co., 25 Quebec
Super. Ct. 224;

R. Co. v. Matkin, (Tex. Civ. App.) 142 S. W.
604;

Paquet v. Dufour, 39 Can. S. Ct. 332;

Chemical Co. v. Lefebvre, 42 Can. S. Ct. 402.

See

R. Co. v. Willis, 58 Fla. 307; 51 S. 134;

Taylor v. R. etc. Co., 16 Philippine 8
(dictum);

R. Co. v. Binkley, 127 Tenn. 77; 153
S. W. 59.

See

Fleming v. R. Co., 160 N. C. 196; 76 S. E. 212.

That there was some negligence in this case is apparent from the evidence itself and the opinion of the trial court. From the standpoint of equity and justice the rule of division of damages should be applied here.

The Constitution of the United States provides that the judicial power of United States shall extend to all cases of admiralty and maritime jurisdiction.

U. S. Const., Art. 3, Sec. 2.

However, it has been held that this jurisdiction is not exclusive, and that state legislation may effect matters intrinsically maritime. The extent to which this is permissible is questionable. It has been stated in *Southern Pacific v. Jensen*, 244 U. S. 205; 61 L. ed. 1086, at page 1098 that:

“In view of these constitutional provisions and the federal act it would be difficult, if not impossible, to define with exactness just how far the general maritime law may be changed, modified, or affected by state legislation. That this may be done to some extent cannot be denied.”

In view of this condition of the law it is interesting to note the consideration given *The Max Morris*,

supra, in the case of *Howard v. Illinois Central Railway Co.*, 207 U. S. 463; 52 L. ed. 297, where the court considers the application of death statutes with regard to the jurisdiction of the admiralty courts on matters essentially maritime. At page 325 the court states:

“State statutes allowing a recovery for death were sustained in *American S. B. Co. v. Chase*, 16 Wall. 522, 21 L. ed. 369, and *Sherlock v. Alling*, 93 U. S. 99, 23 L. ed. 819, though the statute was attacked in the first case only on the ground that it intruded upon the admiralty jurisdiction exclusively vested in the courts of the United States, and in the second case because it interfered with interstate commerce, whose regulation was vested exclusively in Congress. Statutes of this kind have been in force in the states and doubtless in the territories for many years, many cases have been tried under them, and in no case has it ever been claimed that anything in the constitution removes them from the legislative power. The same observation may be made, though not so emphatically, of statutes modifying the common-law rule denying a recovery to one contributing to the injury by his own neglect. It is interesting to note that this court, acting upon the same reasons which doubtless influenced Congress in the enactment of this part of the statute, and established a rule in principle the same to govern the recovery in admiralty of damages by a person injured on a ship. *The Max Morris* (*The Max Morris v. Curry*), 137 U. S. 1, 34 L. ed. 586, 11 Sup. Ct. Rep. 29, holding that it promoted ‘the more equal distribution of justice, the dictates of humanity, the safety of life and limb and the public good.’ ”

In view of these decisions and of the tendency of the admiralty courts to consider equity principles, is it not just and proper, that this court in spite of the nature of the statute under which this death claim is made and the statutory defense thereto, apply principles of equity as found in the rules of admiralty and divide the damages in this cause in accordance with the fault on either party.

III.

The evidence discloses that Moss and Whelihan were negligent in opening the door when they knew that the doorway was unprotected, and on this account the amount of damages adjudged against appellant should be diminished.

The answer to the above proposition is obvious. Moss and Whelihan are not parties to this action and so damages can not be awarded against them. Granting that such is the case, however, in the application of the principles of justice and humanity referred to in *The Max Morris*, supra, should an amount of damages be awarded against the appellant which includes not only the extent of its fault but also the fault of two other persons?

In the case of *No. 6 H.*, 108 Fed. 429, the question in issue was responsibility for damage to five scows. Two scows were fastened by strong lines to a dock by libellant. One of the respondents fastened two scows outside of libellant's scows, and

the other respondent fastened one scow. While the mooring was strong enough to hold libelant's scows, it was not strong enough to hold the whole five. It was the custom to moor scows outside of one another. The scows broke away and were damaged. The court held that fault lay upon all parties and the damages should be accordingly apportioned. On page 432 the court states:

“The damages should be ascertained and one-third thereof borne by the libelants and two-thirds by the outlying scows, each scow as against the other outlying scows bearing two-ninths of all the damage. *The Brothers*, 2 Biss 104, Fed. Cas. No. 1,969; *The Peshtigo* (D. C.), 25 Fed. 488, 401. The legality of such apportionment is recognized in *The Anerly* (D. C.), 48 Fed. 794, 796.”

Approved:

McWilliams v. City of New York, 134 Fed. 1015 (1917).

In the instant case Moss had closed the door at Samoa (Apostles p. 95). He noticed the bar was not in place (Apostles p. 106). On the way over Moss together with Emmett Whelihan opened the door (Apostles p. 146). Emmett Whelihan noticed the bar was not up (Apostles p. 152). The opinion of the trial court concludes that always prior to that evening the bar had been up (Apostles p. 285). There is no evidence that either Whelihan or Moss told Early that the bar was not up. If they did Early is guilty of contributory negligence. If they did not, with the knowledge they had, is not some

of the blame for this accident upon their shoulders? Having noticed a dangerous situation—one which had never before presented itself to them—are they not somewhat at fault for not calling Early's attention to it?

If Moss and Whelihan are somewhat at fault, this court sitting in admiralty should, in application of the rules of equity and humanity and fairness, reduce the claim against appellant to the extent that the accident was the fault of others.

Dated, Eureka,
March 25, 1918.

Respectfully submitted,

CLARENCE COONAN,
NAT SCHMULOWITZ,
*Proctors for Appellant
and Petitioner.*

P. H. RYAN,
Of Counsel.

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for appellant and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition is not interposed for delay.

CLARENCE COONAN,
*Of Counsel for Appellant
and Petitioner.*

No. 2977

United States
Circuit Court of Appeals *4*
For the Ninth Circuit.

ROSE ORR and FRANK L. ORR, doing business
as ORR DRUG CO., or ORR PHARMACY,

Appellants,

vs.

THE COCA COLA COMPANY,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for
the Southern District of California,
Southern Division.

Filed

APR 23 1917

F. D. Monckton,
Clerk.

No.

United States
Circuit Court of Appeals

For the Ninth Circuit.

THE COCA COLA COMPANY,
Appellee.

vs.

ROSE ORR and FRANK L. ORR, doing business as
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the Southern District of California,
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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original record are printed literally in italic; and, likewise, cancelled matter appearing in the original record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

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*In the District Court of the United States for the
Southern District of California, Southern Di-
vision.*

THE COCA COLA COMPANY,

Complainant,

VERSUS

ROSE ORR and FRANK L. ORR, doing business
as ORR DRUG CO., or ORR PHARMACY,
Defendants.

In Equity.

Citation.

The United States of America—ss.

To the Coca Cola Company, Complainant, and to
Messrs. O'Melveny, Stevens and Millikin and
Messrs. Candler, Thompson and Hirsch, Solicitors
for Complainant:

Whereas, the defendants, Rose Orr and Frank L. Orr, doing business as Orr Drug Co., or Orr Pharmacy, have lately appealed to the United States Circuit Court of Appeals in and for the Ninth Circuit, from an order made and entered in the above-entitled action on the 5th day of February, 1917, granting a motion to dismiss plaintiff's bill of complaint and from the decree entered in said cause on the 13th day of February, 1917, dismissing the said plaintiff's bill of complaint, said order and decree being in favor of the said plaintiff and against the said defendants; and

Whereas, the said defendants, Rose Orr and Frank L. Orr, doing business as Orr Drug Co., or Orr Pharmacy, have filed the security required by law;

You are therefore hereby cited to appear before the

said United States Circuit Court of Appeals for the Ninth Circuit to be held at the city of San Francisco, in the state of California, within thirty days from the date of this writ, pursuant to the appeal filed in the clerk's office of the District Court of the United States for the Southern District of California, Southern Division, to show cause, if any there be, why the said order and decree in the said petition for appeal mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Hon. Oscar A. Trippet, judge of the United States District Court for the Southern District of California, Southern Division, this 14th day of February, 1917.

OSCAR A. TRIPPET,
United States District Judge for the Southern District
of California.

*In the District Court of the United States for the
Southern District of California, Southern Di-
vision.*

THE COCA COLA COMPANY,

Complainant,

VERSUS

ROSE ORR and FRANK L. ORR, doing business
as ORR DRUG CO., or ORR PHARMACY,
Defendants.

In Equity.

AFFIDAVIT OF SERVICE.

State of California, County of Los Angeles—ss.

Sidney J. Parsons, being first duly sworn, deposes

and says: That he is counsel and attorney for the defendants in the above-entitled action; that on the 14th day of February, 1917, at 2:30 o'clock p. m. of said day he served the citation in the above-entitled action upon the solicitors and attorneys for the plaintiff, by delivering to and leaving the same with Messrs. O'Melveny, Stevens and Millikin, at their office, 811 to 826 Title Insurance Building, corner of Fifth & Spring streets in the city of Los Angeles, California, in the manner following, to-wit: that a true copy of said citation was left with their stenographer, a person of legal age, in the presence of one of their clerks, Mr. Macdonald and Mr. Stevens being absent from the office at the time; that thereafter Henry Stevens, Esq., called this affiant on the telephone and stated that he preferred to have Mr. Macdonald attend to the matter. That this affiant was unable to find Mr. Macdonald but that said papers were left with the solicitors and attorneys for said plaintiff and this affidavit is made accordingly.

Further this affiant saith not.

SIDNEY J. PARSONS.

Subscribed and sworn to before me this 14th day of February, 1917.

(Seal)

NEIL S. McCARTHY,

Notary Public in and for the County of Los Angeles,
State of California.

[Endorsed]: No. C63. In the District Court of the United States for the Southern District of California, Southern Division. The Coca Cola Company, complainant, versus Rose Orr and Frank L. Orr, doing business as Orr Drug Company or Orr Pharmacy, de-

fendants. In equity. Citation. Filed Feb. 14, 1917. Wm. M. Van Dyke, clerk; by Chas. N. Williams, deputy clerk. S. J. Parsons, attorney for defendants. (1004 Trust & Sav. Bldg.)

*In the District Court of the United States for the
Southern District of California, Southern Di-
vision.*

THE COCA COLA COMPANY,

Complainant,

VERSUS

ROSE ORR and FRANK L. ORR, doing business
as ORR DRUG COMPANY, or ORR PHAR-
MACY,

Defendant.

In Equity. No.

Application for Injunction, &c.

Bill of Complaint.

To the Honorable, the Judges of the District Court of
the United States for the Southern District of
California, Southern Division:

The Coca Cola Company, complainant, respectfully represents that it is a corporation organized, existing and doing business under and by virtue of the laws of the state of Georgia, and having its principal office and place of business in the city of Atlanta, in the state of Georgia; and being a citizen of the state of Georgia, within the meaning of the Constitution and laws of the United States; and that the defendants, Rose Orr and Frank L. Orr, are residents and citizens of the state of California, and having their principal place

of business in and being residents and inhabitants of Los Angeles, in the county of Los Angeles, state of California, and within the Southern District of California; and being citizens and residents of the state of California, within the meaning of the Constitution and laws of the United States.

That the jurisdiction of this court arises by reason of the diversity of citizenship of the parties hereto, and in that the matter here in dispute exceeds the sum or value of three thousand dollars, exclusive of interest and costs.

And thereupon, your orator complains, and says:

First: That it is and has been since the year 1892, continuously engaged in the manufacture and sale of a certain beverage, known as Coca Cola, which beverage is of a distinctive color and flavor, and for which said product under said name, your orator has established a large and valuable trade in the city of Los Angeles, California, and elsewhere, antecedent to the inequitable conduct of defendant hereinafter alleged.

Second: That said beverage is made in the form of a syrup by your orator, which said syrup when mixed with carbonated water in certain proportions, forms a soft drink or beverage sold and dispensed at soda fountains or in bottles to consumers over almost all of the United States, and several foreign countries and that very large quantities of said syrup are constantly manufactured by your orator to supply the large demand therefor.

Third: That your orator has expended vast sums of money in advertising its said product under said name, Coca Cola, and that said product under said

name is widely known to the consuming public, and a majority of the soda fountains in the United States dispense your orator's beverage, Coca Cola. Your orator shows that there is not, and never has been any other soda fountain beverage manufactured or sold throughout the United States known as Coca Cola, except that manufactured by your orator, and that when persons call for Coca Cola at any soda fountain in the United States, they refer to the drink or beverage manufactured by your orator.

Fourth: That your orator, in the manufacture of said syrup, has, at all times, colored said syrup by the use of caramel, which imparts to the syrup a distinctive and characteristic color, and is used solely for that end and purpose, and is a decorative addition to the syrup, and not structural; and that the drink is, in part, necessarily recognized and distinguished by said color, and that it is impossible for anyone desiring to purchase Coca Cola to ascertain, from a mere inspection, whether or not the article offered is genuine Coca Cola or an imitation, provided the general appearance of the product as to color and consistency is similar to Coca Cola.

Fifth: That your orator, by virtue of its adoption and continuous and exclusive use of said name, Coca Cola, in connection with its said product, has acquired and is now vested with the sole and exclusive right to said name; and that your orator's use of said name has been acquiesced in by the trade and public generally; and which exclusive right has been adjudged to your orator by the courts of the United States. That your orator has, in the course of its manufacture and

sale of said product, established a good will, of which said name is an integral part, and that said good will is of a value in excess of three thousand dollars, exclusive of interest and costs.

Sixth: That the defendants are, and have been for some time past, in possession of, and operate and have operated a soda fountain in their store, located corner Twelfth and Maple streets in the city of Los Angeles, state of California, under the name and style of Orr Drug Company, or Orr Pharmacy. That said defendants are fully advised of your orator's rights above described and of the large and subsisting public demand for the beverage, Coca Cola. That the defendants have, for some time past, instituted and maintained and are now maintaining at the said place of business conducted by them in said city of Los Angeles, as above set forth, an unfair competition with your orator, in this, that in response to orders for your orator's product, Coca Cola, the defendants have delivered and sold and are now delivering and selling, a **spurious** and inferior beverage, the color whereof is in simulation of your orator's beverage as and for the carbonated drink made from your orator's Coca Cola syrup.

That in furtherance of their scheme to defraud your orator and the public, the defendants have compelled their employees to use said spurious syrup to make the drinks served to customers ordering your orator's product; and that said substitutions were made, and are now made by defendants whenever Coca Cola is called for by a customer, in fraud of the purchasing public, and in violation of your orator's rights.

That the said infringing acts of the defendants have been committed by them without the license or consent of your orator, and that said acts of the defendants are now continuing, and threaten to injure, and have injured and are now injuring the good will of your orator, and the reputation of its beverage; and unless restrained by the injunctive power of this Honorable Court, will jeopardize or destroy the value of your orator's good will, the reputation of its beverage, and its rights in the premises.

Seventh: That by said acts, defendants have diverted to themselves profits to which your orator was lawfully entitled, and which your orator would otherwise have received, the amount whereof can only be ascertained by an accounting.

That your orator is without adequate remedy at law in the premises.

Wherefore, your orator prays:

(a) That a writ of *subpoena ad respondendum* be issued, in due form of law, requiring the defendants to appear and answer all and singular the matters and things hereinabove complained of, but not under oath, an answer under oath being hereby expressly waived.

(b) That the defendants, their agents, servants and employees, and each of them, may be enjoined:

1. From infringing upon the trade rights of your orator hereinabove described and from the further commission of the acts of substitution hereinabove complained of.

2. From selling and delivering, in response to requests or orders for Coca Cola, any beverage other

than that made from the Coca Cola syrup manufactured by your orator.

3. From using any name sufficiently similar to the name of Coca Cola, or any name, applied to any drink, as to cause deceit.

4. From marketing a product of the same identical or similar color so long used by your orator in its product.

5. From selling or exposing for sale any beverage other than your orator's product, Coca Cola, having the peculiar and distinctive color and appearance of your orator's product, or any such approximation thereof as may be likely to deceive the public without such differentiation as will effectually prevent the passing off of a spurious product as and for the product of your orator.

(c) That the defendants and all of their associates, salesmen, servants, clerks, agents, workmen, employees, attorneys and each and every person claiming under, by or through said defendants be enjoined and restrained as aforesaid during the pendency of this suit.

(d) That an accounting of the profits and damages in the premises be directed and taken under the direction of the court, and judgment thereon rendered; and that the defendant be adjudged to pay the costs herein.

(e) That your orator have such other and further relief in the premises as may be just and equitable.

And your Orator will ever pray.

THE COCA COLA COMPANY,

By Chas. H. Candler, Pt.

(Seal of Corporation.)

O'MELVENY, STEVENS & MILLIKIN,
CANDLER, THOMSON & HIRSCH,

Solicitors and of Counsel for Complainant.

Candler Building, Atlanta, Georgia.

*In the District Court of the United States for the
Southern District of California, Southern Division.*

THE COCA COLA CO.,

Complainant,

VERSUS

ROSE ORR, and FRANK L. ORR, doing business as
ORR DRUG COMPANY or ORR PHARMACY,
Defendant.

In Equity. No.

Application for Injunction, &c.

State of Georgia, County of Fulton.

Personally appeared before the undersigned authority, Charles H. Candler, president of the complainant in the above cause, who, being first duly sworn as to the truth of the allegations made in the above bill, says that he has read the foregoing bill, and knows the contents thereof; and that the same is true of his own knowledge, except as to these matters therein stated to be alleged on information and belief, and as to those matters he believes them to be true.

CHAS. H. CANDLER.

Sworn and subscribed before me this 27th day of
Oct., 1916.

(Seal)

W. A. LANDERS,

Notary Public Fulton County, Georgia.

[Endorsed]: No. C 63 Eq. In Equity. In the Dist.
Court of the U. S. for the Southern District of California, Southern Division. The Coca Cola Co., complainant vs. Rose Orr and Frank L. Orr, doing business as Orr Drug Co. or Orr Pharmacy, defendant. Bill of Complaint and Application for Injunction. Filed Dec. 11, 1916. Wm. M. Van Dyke, clerk; by Chas. N.

Williams, deputy clerk. Candler, Thomson & Hirsch, attorneys and counsellors at law, 1430 Candler Building, Atlanta, Ga.

United States of America.

*District Court of the United States, Southern District
of California, Southern Division.*

In Equity.

Subpoena.

The President of the United States of America, Greeting: To Rose Orr and Frank L. Orr, Doing Business as Orr Drug Company, or Orr Pharmacy.

You are hereby commanded that you be and appear in said District Court of the United States aforesaid, at the court room in Los Angeles, California, on or before the twentieth day, excluding the day of service, after service of this subpoena upon you, to answer a bill of complaint exhibited against you in said court by The Coca Cola Company, who is a citizen of the state of Georgia, and to do and receive what the said court shall have considered in that behalf. And this you are not to omit, under the penalty of five thousand dollars.

Witness, the Honorable Benjamin F. Bledsoe, judge of the District Court of the United States, this 12th day of December, in the year of our Lord one thousand nine hundred and sixteen and of our Independence the one hundred and forty-first.

(Seal)

WM. M. VAN DYKE, Clerk.

By R. S. Zimmerman, Deputy Clerk.

Memorandum Pursuant to Rule 12, of Rules of Practice for the Courts of Equity of the United States, Promulgated by the Supreme Court, November 4, 1912.

On or before the twentieth day after service of the subpoena, excluding the day thereof, the defendant is required to file his answer or other defense in the clerk's office; otherwise the bill may be taken *pro confesso*.

WM. M. VAN DYKE, Clerk.

By R. S. Zimmerman,
Deputy Clerk.

To the Marshal of the United States for the Southern District of California:

Pursuant to Rule 12, the within subpoena is returnable into the clerk's office twenty days from the issuing thereof.

Subpoena issued December 12th, 1916.

WM. M. VAN DYKE, Clerk.

By R. S. Zimmerman,
Deputy Clerk.

Received 10:40 a. m., Dec. 12, 1916. U. S. marshal's office, Los Angeles, Cal.

United States Marshal's Office, Southern District of California—ss.

I hereby certify, that I received the within writ on the 12th day of December, 1916, and personally served the same on the 12th day of December, 1916, on Rose Orr, and Frank L. Orr, by delivery to and leaving with Frank L. Orr, said defendant named therein.

personally, at the county of Los Angeles, in said district, a copy thereof.

Los Angeles, Dec. 12, 1916.

C. T. WALTON,
U. S. Marshal.
By Edmund L. Smith,
Deputy.

[Endorsed]: Marshal's Civil Docket No. 3210. No. C 63 Equity. U. S. District Court, Southern District of California, Southern Division. In Equity. The Coca Cola Company vs. Rose Orr and Frank L. Orr, etc. Subpoena. Filed Dec. 13, 1916. Wm. M. Van Dyke, clerk; by R. S. Zimmerman, deputy clerk. Eq. R. B. 108.

*In the District Court of the United States, for the
Southern District of California, Southern Division.*
THE COCA COLA COMPANY,

Complainant,

vs.

ROSE ORR and FRANK L. ORR, doing business as
ORR DRUG COMPANY or ORR PHAR-
MACY,

Defendants.

**Order to Show Cause Why Preliminary Injunction
Should Not Issue.**

Whereas, in the above entitled cause it has been made to appear from the bill of complaint filed herein that good reason exists why a temporary injunction should issue enjoining and restraining defendants, and each of them, from continuing the acts complained of in said

bill of complaint pending the final hearing and determination of this cause.

Now, therefore, it is hereby ordered that said defendants, and each of them, be and appear before this court in its court rooms in the Federal Building, located at the junction of Temple, Main and Spring streets in the city of Los Angeles, county of Los Angeles, state of California, on the 18th day of December, 1916, at the hour of 10 o'clock a. m., then and there to show cause, if any they have, why such temporary injunction should not issue.

BLEDSON,

Judge.

Dated Los Angeles, California, December 11th, 1916.

Received 4:50 p. m., Dec. 11, 1916. U. S. marshal's office, Los Angeles, Cal.

RETURN ON SERVICE OF WRIT.

United States of America, So. District of Calif.—ss.

I hereby certify and return that I served the annexed order to show cause on the therein named Rose Orr and Frank L. Orr, by handing to and leaving a true and correct copy thereof with Frank L. Orr personally at Los Angeles, in said district, on the 12th day of December, A. D. 1916.

C. T. WALTON,

U. S. Marshal.

By Edmund L. Smith,

Deputy.

[Endorsed]: (Copy) Marshal's Civil Docket No. 3210. No. C 63 Equity. In the United States District Court, in and for the Southern District of California, Southern Division. The Coca Cola Company,

complainant, vs. Rose Orr and Frank L. Orr, doing business as Orr Drug Company, or Orr Pharmacy, defendants. Order to Show Cause Why Preliminary Injunction Should Not Issue. Filed Dec. 13, 1916. Wm. M. Van Dyke, clerk; by R. S. Zimmerman, deputy clerk. Eq. R. B. 107. O'Melveny, Stevens & Millikin, suite 825 Title Insurance Bldg., N. E. corner Fifth & Spring Sts., Los Angeles, Cal., attorneys for complainant.

*In the District Court of the United States, for the
Southern District of California, Southern Division.*
THE COCA COLA COMPANY,

Complainant,

VERSUS

ROSE ORR, and FRANK L. ORR, doing business as
ORR DRUG COMPANY or ORR PHAR-
MACY,

Defendants.

In Equity. No. C 63.

Answer.

The answer of Rose Orr and Frank L. Orr, doing business as the Orr Pharmacy, namely, Rose Orr, doing business under a fictitious name, answers the bill of complaint of the plaintiff, The Coca Cola Company, and for answer to said bill denies and alleges as follows:

These defendants, saving and reserving to themselves all right of exceptions to the said bill of complaint, on account of the many errors therein contained, for answer thereto, or for so much and such parts thereof as they are advised by counsel it is necessary

or important for them to answer, make answer thereunto and answering say:

These defendants say that for several years last past and since on or about the 3rd day of May, 1915, the said defendant Rose Orr has done business under a fictitious name, namely, under the name of "Orr Pharmacy" and that said business has been conducted at number 1200 Maple avenue in the city of Los Angeles, California, namely at the corner of Maple avenue and Twelfth street in said city, and is now conducting the said business; that the defendant Frank L. Orr has been general manager of said business and in control thereof for the said Rose Orr during all of said time, and is now in control of said business as such manager and agent and not otherwise.

These defendants say that they have no knowledge or information other than from the said bill of complaint as to the alleged incorporation of the said The Coca Cola Company under the laws of the state of Georgia, or any other state, or as to whether or not said corporation has its principal place of business in the city of Atlanta, Georgia, or elsewhere, in the state of Georgia, or as to whether or not said complainant is a citizen of the state of Georgia; wherefore these defendants cannot admit or deny the allegations of said bill relative to said matters and insist that complainant make proof thereof.

These defendants say that they have no knowledge other than the allegations of said bill of complaint as to whether, since the year 1892, or any other date, the said complainant has continuously engaged in the manufacture and sale of a certain beverage known as

Coca Cola, or any other beverage, which said beverage is alleged to be of a distinctive color and flavor and for which said product, under said name, or any name, the said complainant has established a large and valuable trade in the city of Los Angeles, California, and elsewhere antecedent to the times mentioned in said bill of complaint, or at any other time; and that these defendants cannot admit or deny the said allegations of said bill relative thereto, and therefore these defendants insist that complainant make proof thereof.

That these defendants have no knowledge or information other than from said bill of complaint that said beverage is made by the said complainant in the form of a syrup, which, when mixed with carbonated water in certain proportions, forms a soft drink or beverage sold and dispensed at soda fountains or in bottles to customers over almost all of the United States and several foreign countries and that very large quantities of said syrup are constantly manufactured by complainant to supply the large demand therefor; and these defendants therefore cannot admit or deny the allegations of said bill relative thereto and they therefore insist that complainant make proof thereof.

That these defendants have no knowledge or information other than from said bill of complaint as to the fact that the said complainant has expended vast sums of money in advertising its said product under the name of Coca Cola and that the said product under said name is widely known to the consuming public and that a majority of soda fountains in the United States dispense complainant's beverage, Coca Cola; and these defendants say that they have no knowledge or in-

formation other than from said bill of complaint as to the fact that there is not and never has been any other soda fountain beverage sold throughout the United States known as Coca Cola other than that manufactured by the complainant, and these defendants say that they have no knowledge or information other than from said bill of complaint that when persons call for Coca Cola at any soda fountain in the United States, that they, the said customer, refer to the drink or beverage manufactured by the said complainant.

These defendants admit, upon information and belief, that the said syrup of Coca Cola is colored by the use of caramel or burnt sugar; but these defendants allege that they have no information, except from said bill of complaint, that the said caramel or burnt sugar imparts to the said syrup a distinctive and characteristic color; and these defendants say that they have no information other than from the said bill of complaint that the said caramel or burnt sugar is used solely to color the said beverage and is a decorative addition to said syrup and not structural; and these defendants allege that they have no information other than from said bill of complaint that the said drink, to-wit, Coca Cola, is in part necessarily recognized and distinguished by said color and that it is impossible for consumers, desiring to purchase Coca Cola, to ascertain from mere inspection whether or not the article offered is genuine Coca Cola or an imitation, provided the general appearance of the product as to color and consistency is similar to Coca Cola, and therefore these defendants cannot admit or deny the allegations of said bill relative

to said matters and they insist that complainant make proof thereof.

These defendants say that they have no knowledge or information other than from said bill of complaint as to the allegations that the said complainant, by virtue of its adoption and continuous and exclusive use of the name, Coca Cola, in connection with said product, has acquired and is now vested with the sole and exclusive right to said name, and therefore these defendants cannot admit or deny the allegations of said bill relative thereto and they insist that complainant make proof thereof; and these defendants say that they have no knowledge or information, other than from said bill of complaint, as to the allegations that the complainant's use of the said name, to-wit, Coca Cola, has been acquiesced in by the trade and public generally, and these defendants therefore cannot admit or deny the said allegations of said bill relative thereto and they insist that complainant make proof thereof.

These defendants further say that they have no information, other than from the said bill of complaint, as to the alleged fact that the said complainant has been adjudged the exclusive right to the use of the said name, Coca Cola, by the courts of the United States, or by any other court, and they cannot, therefore, admit or deny the said allegations of said bill and insist that complainant make proof thereof.

These defendants allege that they have no information, other than from the said bill of complaint, that the said complainant in the course of its manufacture and sale of its said product, to-wit, Coca Cola, has established a good-will therein, of which said name is

an integral part, and that said good-will is of a value in excess of three thousand dollars, exclusive of interest and costs, and these defendants, therefore, say that they cannot admit or deny the allegations of said bill relative thereto and insist that complainant make proof thereof.

Further answering the said bill of complaint of complainant, and particularly the sixth paragraph thereof, these defendants say that since May, 1915, the said defendant Rose Orr has conducted a drug business and drug store at the corner of Twelfth street and Maple avenue in the city of Los Angeles, California, under the name of the "Orr Pharmacy," and that the said Frank L. Orr has been the general manager of said business and in control thereof as agent for the said Rose Orr.

Further answering the said sixth paragraph of said bill of complaint, these defendants say that they are not fully advised of the complainant's rights in and to the said beverage known as and called Coca Cola, nor that the said complainant has a trade-mark therein by user or otherwise. These defendants expressly deny that they have, at any time, maintained at said place of business, or at any other place in the city of Los Angeles, an unfair competition with the complainant in the sale of the said beverage, Coca Cola, or otherwise; and these defendants expressly deny that they ever, by themselves or their agents, in response to orders for complainant's product, Coca Cola, delivered and sold any beverage, either spurious and inferior, or otherwise, in the place and stead of Coca Cola; and these defendants expressly deny that they, at their

said place of business, are now delivering or ever have delivered to any purchaser as and for Coca Cola any other beverage whatever than the Coca Cola of the complainant, either spurious and inferior, or otherwise, and these defendants expressly deny that they have ever, at any time, either by themselves or through any agent or clerk, sold and delivered to any person any other beverage of any kind whatsoever and for Coca Cola at their said place of business at Twelfth street and Maple avenue in the said city of Los Angeles, or at any other place and that all allegations in said bill of complaint to the contrary are false.

These defendants further answering the said bill of complaint of the complainant and particularly the sixth paragraph thereof, deny that they ever, in any way or manner, sought to defraud the public, or the complainant, in the sale of any product as and for Coca Cola which was not in truth and in fact Coca Cola, the syrup of which was manufactured by the complainant; and these defendants expressly deny that they ever compelled their employees, or any of their employees, or requested or desired any agent or employee of theirs, to use spurious syrup to make drinks served to customers ordering complainant's product, Coca Cola; and these defendants expressly deny that any such deception was ever practiced by them, in any way or manner, or by their order, or by any clerk or employee of theirs at their said place of business, or at any other place.

These defendants further answering complainant's said bill of complaint, and particularly as to the sixth paragraph thereof, deny that they now, or at any time,

have substituted any other product, whether inferior or otherwise, for Coca Cola, in fraud of the purchasing public, or in violation of the complainant's rights, or otherwise, but that they, their agents and clerks, have at all times been requested to furnish to the consuming public true Coca Cola, the syrup of which was manufactured, as these defendants are informed and verily believe, by the said complainant and no one else.

These defendants further answering the said bill of complaint expressly deny that they are now threatening to continue to sell some other product, whether inferior or otherwise, in the place and stead of Coca Cola, or that they ever intend so to do, or ever have so done at their said place of business in the city of Los Angeles, or at any other place, and that all allegations in said bill of complaint to the contrary are false.

These defendants further answering the said bill of complaint, and particularly the seventh paragraph thereof, deny that these defendants have diverted to themselves profits to which the complainant was lawfully entitled and which the complainant would otherwise have received, in any way or manner, either by the sale of any different product or drink as Coca Cola, or otherwise, at their said place of business in the city of Los Angeles, or at any other place, and deny that they ever thought or intended so to do, or gave any orders to any clerk or employee so to do; and these defendants deny that they have in any way or manner injured or damaged the said complainant as alleged in the said bill of complaint, or otherwise, by the sale of some other or different drink or product as Coca

Cola manufactured by complainant, whether inferior or spurious, or otherwise, and that all allegations to the contrary contained in the said bill of complaint, are wholly false and without any foundation whatever in fact.

Wherefore these defendants ask that the said complainant take nothing herein, and these defendants ask and humbly pray that they be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

ROSE ORR,

doing business as Orr Pharmacy and

FRANK L. ORR,

SIDNEY J. PARSONS,

Solicitor and Counsel for Defendants.

United States of America, Ninth Judicial District of California,—ss.

Rose Orr and Frank L. Orr, being first duly sworn each for themselves, say: That they have each read the foregoing answer to plaintiff's bill of complaint and know the contents thereof and that the same is true of their own knowledge; except as to the matters therein stated upon information and belief, or denied for want of information sufficient to form a belief and as to those matters they believe it to be true.

ROSE ORR.

FRANK L. ORR.

Subscribed and sworn to before me this 27th day of December, 1916.

(Seal)

SIDNEY J. PARSONS,

Notary Public in and for the County of Los Angeles,
State of California.

[Endorsed]: Original. No. C 63. In the District Court of the United States, Southern District of California, Southern Division. The Coca Cola Company, complainant versus Rose Orr & Frank L. Orr, doing business as Orr Drug Company or Orr Pharmacy. In Equity. Answer. Filed Jan. 2, 1917. Wm. M. Van Dyke, clerk; by R. S. Zimmerman, deputy clerk. S. J. Parsons, atty, for defendants.

*In the District Court of the United States, for the
Southern District of California, Southern Division.*
THE COCA COLA CO.,

Complainant,

vs.

ROSE ORR and FRANK L. ORR, doing business as
ORR DRUG CO. or ORR PHARMACY,
Defendants.

In Equity. No.

Application for Injunction.

Affidavit of S. C. Dobbs.

State of Georgia, County of Fulton.

Before me, a notary public in and for said state and county, personally came S. C. Dobbs, who being first duly sworn in the above stated case, on oath, deposes and says:

That he is a resident of the city of Atlanta, state of Georgia, and is and has been for twenty years connected with The Coca-Cola Company, complainant in the above stated case, and in such capacity has been

familiar with the details of the management and manufacture, and particularly with the advertisements, of complainant.

That deponent for about 10 years had been advertising manager of The Coca-Cola Company, complainant in this case, and in such capacity is familiar with the nature and extent of the advertising which has been done by said company during said time. That even before deponent became advertising manager he was familiar, in a general way, with the advertising done by said company. That in all advertising, which consisted of space in newspapers and magazines, and in specialty advertising, The Coca-Cola Company has used the word "Coca-Cola" as a trade name for its product, and that complainant has so used said name since deponent became advertising manager of complainant.

That all of complainant's advertisements have taken the form of newspaper advertisements, published and circulated in the United States and foreign countries; and advertisements in magazines and periodicals circulating in the United States and foreign countries; and on billboards, signboards, street and railway cars, and in specialties. That said complainant has expended vast sums in advertising the product Coca-Cola under said trademark, and trade name, Coca-Cola, since deponent took charge of said advertising. That during the year 1905 complainant expended the sum of \$280,985.12 in such advertising; and that an increasingly larger amount has been expended in such advertising for every year since, up to the present time.

Deponent says that said trademark, Coca Cola, has

been used continuously by complainant on its labels and in the advertising of complainant from the time deponent first became acquainted with and employed by said company.

Deponent states that said product has always had the same color and general appearance that it now has, and that the color and general appearance has become familiar to the general public, and that said color, insofar as soft drinks are concerned, is distinctive of the article manufactured by complainant.

Deponent says that he has read the bill of complaint filed by complainant in above stated case, and is familiar with the fact referred to and alleged as pertaining to complainant's product, and that he has examined the bill of complaint in regard to acts of defendant, and that the allegations of said bill of complaint as pertaining to the product of complainant, the color of complainant's product, and the use of said product and the enormous amount of advertising, are true.

Deponent makes this affidavit for use in above stated case.

And further deponent saith not.

S. C. DOBBS.

Sworn to and subscribed before me this 27th day of Oct., 1916.

(Seal)

W. A. LANDERS,

Notary Public, Fulton County, Ga.

[Endorsed]: No. C 63 Eq. In Equity. In the U. S. District Court for the Southern Dist. of California, Southern Division. The Coca Cola Co., complainant, vs. Rose Orr and Frank L. Orr, doing busi-

ness as Orr Drug Co., defendants. Affidavit of S. C. Dobbs. Filed Dec. 11, 1916. Wm. M. Van Dyke, clerk; by Chas. N. Williams, deputy clerk. Candler, Thomson & Hirsch, attorneys and counsellors at law, 1430 Candler Building, Atlanta, Ga.

*In the District Court of the United States, for the
Southern District of California, Southern Division.*
THE COCA COLA CO.,

Complainant,

vs.

ROSE ORR and FRANK L. ORR, doing business as
ORR DRUG CO. or ORR PHARMACY,
Defendants.

In Equity. No.

Application for Injunction.

Affidavit of Charles H. Candler.

State of Georgia, County of Fulton.

Before me, a notary public in and for said state and county, personally came Charles H. Candler, who, being first duly sworn in the above stated case, on oath deposes and says:

That he is president of The Coca-Cola Company, the complainant in the above stated case, and that he has been president, vice-president or general manager of The Coca-Cola Company for eight years. That deponent's official duties in connection with said company are and have been for said period, the manufacturing of the syrup known and sold as Coca-Cola, and that holding said position, and carrying on its duties, deponent is familiar and well acquainted with the manufacturing of said Coca-Cola.

That deponent has been connected with The Coca-Cola Company for sixteen years, and has been employed by The Coca-Cola Company in many capacities, but that at all times, he has been familiar with said drink or beverage, Coca-Cola. Deponent states that said beverage, Coca-Cola, has been manufactured and sold by The Coca-Cola Company, complainant in this case, for a period of more than twenty years, and that said company has continuously and uninterruptedly since its organization, engaged in the manufacture and sale of said product, Coca-Cola. Deponent states that the Coca-Cola manufactured by complainant is, and has always been, since the organization of complainant, colored by a substance known as caramel, which is used by complainant in the manufacture of said product for the sole and exclusive purpose of giving to said product the particular and distinctive color which it has, and has always had, and by which deponent says it has become known to consumers of said beverage throughout practically all of the states of the United States, and in many foreign countries.

That if said coloring were left out of the product manufactured by complainant, and the product should be left in its natural state or color, resulting from the combination of all the ingredients of said product except caramel, that said product would be a light golden color, but that by using said caramel, said product is given a distinctive color of a reddish-brown nature, and that said caramel has no other effect whatsoever on said syrup, and makes no change in the taste, flavor or quality thereof, and is put into

said product for the sole and exclusive purpose of giving it a distinctive color.

Deponent says that for more than twenty years, continuously and uninterruptedly, complainant has been manufacturing said product, Coca-Cola, and has been engaged in the sale of said product, selling same throughout the United States, and has been continuously and uninterruptedly using on said product in commerce between the several states of the United States, the name or mark Coca-Cola, and that said Coca-Cola has been used exclusively by complainant for its product and has never been used as designating or applicable to the product of any other manufacturer.

That in a few instances, other manufacturers than complainant have attempted to get out a beverage similar to the product of complainant, and to use as the name of same, the name "Coca-Cola" either alone or in combination with other word or words, but that in all such instances, complainant has promptly, upon having its attention called to the attempted use of said name by others, brought about a cessation of said use by calling the attention of such parties to the rights of complainant, and having them thereby desist from the use of said name, or by instituting suits against such parties and procuring from the various courts of the district in which said word was used injunctions preventing the further use of the name "Coca-Cola," either alone or in combination with other words, or any product other than the product of complainant; and deponent says that the said name Coca-Cola has become known to the public generally, throughout the entire United States, as the name and

designation of the particular product of complainant, and means, and has come to mean exclusively, as deponent is informed and believes, complainant's product.

Deponent states that he has read the bill of complaint filed by complainant in this case, and is familiar with the facts referred to and alleged as pertaining to complainant's product, and that deponent has examined the bill of complaint in regard to the acts of defendant, and that the allegations of said bill as pertaining to the product of complainant, the color of complainant's product, and the enormous amount of advertising, are true.

Deponent makes this affidavit for use in above stated case.

And further, deponent saith not.

CHAS. H. CANDLER.

Sworn to and subscribed before me this 27th day of Oct., 1916.

(Seal)

W. A. LANDERS,

Notary Public, Fulton County, Ga.

[Endorsed]: No. C 63 Eq. In Equity. In the U. S. Dist. Court for the Southern Dist. of California, Southern Division. The Coca Cola Co., complainant, vs. Rose Orr and Frank L. Orr, doing business as Orr Drug Co. or Orr Pharmacy, defendants. Affidavit of Chas. H. Candler. Filed Dec. 11, 1916. Wm. M. Van Dyke, clerk; by Chas. N. Williams, deputy clerk. Candler, Thomson & Hirsch, attorneys and counsellors at law, 1430 Candler Building, Atlanta, Ga.

*In the District Court of the United States, for the
Southern District of California, Southern Division.*

THE COCA COLA COMPANY,

Complainant,

VERSUS

ROSE ORR and FRANK L. ORR, doing business as
ORR DRUG COMPANY or ORR PHAR-
MACY,

Defendant.

In Equity. No.

Application for Injunction, &c.

Affidavit of H. B. Pierce.

State of Georgia, County of Fulton.

Before me, a notary public in and for said state and county, personally came H. B. Pierce, who, being duly sworn in above-stated case, on oath deposes and says:

That he is over twenty-one years of age, and resides in the city of Atlanta, state of Georgia.

That deponent is, and has been for sometime past in the employment of The Coca Cola Company, complainant herein, deponent having had considerable experience in the investigation of sales of substitute products as and for complainant's product, Coca-Cola, by retail dealers; and that for sometime past deponent has had charge of the investigation department of said complainant in connection with the work of investigation as to sales of such substitute products. As a result of such experience, deponent has become thoroughly familiar with the product, Coca-Cola, and with the taste, color and general appearance thereof, and with the manner in which same is sold, both at the soda fountain and in bottled form.

That deponent, at the suggestion of complainant herein, during the month of August, 1915, visited the city of Los Angeles, California, where deponent made an investigation as to the sale by defendants herein of a product as and for Coca-Cola, at their soda fountain in said city of Los Angeles, located corner Twelfth and Maple avenues. This deponent was accompanied on said visits by a witness as hereinafter set out; and drinks and samples of the product being served as and for Coca-Cola were purchased at said fountain, as hereinafter set out; no explanation being made on any of such occasions as to the product so furnished; such drinks or samples being on each occasion drawn from the fourth container to left of carbonated water spigot labeled "Coke"; all of such drinks or samples being of the same general appearance and color as Coca-Cola syrup:

August 26-1915, 8:00 p. m. Purchaser, H. B. Pierce; witness, O. N. Normandin. Drink served as and for Coca-Cola.

August 27-1915, 1:20 p. m. Purchaser, H. B. Pierce; witness, O. N. Normandin. Drink served as and for Coca-Cola.

August 26-1915, 8:00 p. m. Purchaser, H. B. Pierce; witness, O. N. Normandin. Sample of syrup sold as and for Coca-Cola.

August 27-1915, 1:20 p. m. Purchaser, H. B. Pierce; witness, O. N. Normandin. Sample of syrup sold as and for Coca-Cola.

That this deponent requested H. N. Lloyd and C. N. Robbins of Los Angeles to call at said store of defendant on August 26th and 27th, 1915, for the purpose

of making test purchases; and that in accordance with such instructions, said Lloyd and Robbins did call at said store on several occasions on said dates, where purchases were made of the product being so sold as and for Coca-Cola.

That deponent, immediately following the purchase of the samples above named on August 26th and 27th, 1915, carried such samples to the room of deponent, where, in the presence of said Normandin, same were, on each occasion, sealed and labeled, deponent and said Normandin each attaching our signatures to the labels affixed to said bottles. Deponent attached to said bottles the numbers "2057" and "2058" for identification by deponent.

That while said bottles were each sealed and labeled, and said samples in the same condition as when so purchased, deponent packed said three samples and shipped same from Los Angeles, California, on August 27th, 1915, to Dr. H. C. Fuller, Washington, D. C., for the purpose of having an analytical examination made of such samples, said shipment being made by Adams Express.

That said Dr. H. C. Fuller reported to deponent on October 1st, 1915, that neither of said samples so analyzed was Coca-Cola, the product of complainant herein.

Deponent has examined the exhibits attached to the affidavit of Dr. H. C. Fuller in this case as Exhibits "A" and "B," and that said samples are the same hereinabove referred to, purchased by this deponent at the store of defendants herein; and such exhibits now contain the same labels placed thereon by deponent,

and a portion of the syrup, of same color and appearance as that so purchased, deponent identifying such exhibits by the labels thereon, and by the numbers placed thereon by deponent.

Deponent makes this affidavit for use in the above stated case.

And further, deponent saith not.

H. B. PIERCE.

Sworn to and subscribed before me this 2nd day of November, 1916.

(Seal)

LILIAN STANSBURY,
Notary Public, Fulton County, Ga.

[Endorsed]: No. C 63 Eq. In Equity. In the Dist. Court of the U. S., for the Southern District of California, Southern Division. The Coca Cola Co., complainant, vs. Rose Orr and Frank L. Orr, doing business as Orr Drug Co. or Orr Pharmacy, defendants. Affidavit of H. B. Pierce. Filed Dec. 11, 1916. Wm. M. Van Dyke, clerk; by Chas. N. Williams, deputy clerk. Candler, Thomson & Hirsch, attorneys and counsellors at law, 1430 Candler Building, Atlanta, Ga.

*In the District Court of the United States, for the
Southern District of California, Southern Division.*
THE COCA COLA COMPANY,

Complainant,

VERSUS

ROSE ORR and FRANK L. ORR, doing business as
ORR DRUG COMPANY or ORR PHAR-
MACY,

Defendants.

In Equity. No.

Application for Injunction, &c.

Affidavit of O. N. Normandin.

State of California, County of Los Angeles.

Before me, a notary public in and for said state and county, personally came O. N. Normandin, who, being first duly sworn in above stated case, on oath deposes and says:

That he is over twenty-one years of age, and resides in the city of Los Angeles, California.

That deponent is, and has been, for sometime past thoroughly familiar with the product Coca-Cola manufactured by complainant herein, deponent's familiarity with such product having been gained through consumption thereof.

That during the latter part of August, 1915, H. B. Pierce of Atlanta, Ga., was in the city of Los Angeles, and that at the request of said Pierce this deponent assisted said Pierce in making several purchases at the store of defendants herein, located corner Twelfth and Maple streets, in said city of Los Angeles. That deponent has read the affidavit of said Pierce in this case as to such visits so made; and that same is true and correct as to all of such purchases therein stated to have been made; and that the product sold on each of such occasions was sold as and for Coca-Cola, and without explanation.

That samples of said product were also purchased by said Pierce in the presence of deponent on August 26th and 27th, 1915, respectively, as set forth in the affidavit of said Pierce; and that each of such samples was sold as and for Coca-Cola, and in response to call for Coca-Cola syrup, and without explanation.

That such samples were sealed and labeled by said Pierce in the presence of deponent, as stated in the affidavit of said Pierce, while in the same condition as when purchased.

Deponent has examined the exhibits attached to the affidavit of H. C. Fuller in this case as Exhibits "A" and "B," respectively, and that said exhibits are the samples so purchased by said Pierce in the presence of deponent at defendant's place of business; deponent identifying said samples by the labels thereon. That said exhibits now contain a portion of syrup of the same color and appearance as that so purchased.

Deponent says that during the month of March, 1916, this deponent was requested by Geo. H. Reed of The Coca-Cola Co., Los Angeles, California, to make an investigation at the place of business of defendants herein, as to the product being sold as and for Coca-Cola; and that in conjunction with C. N. Robbins of Los Angeles this deponent on several occasions visited said store of defendants, where drinks and samples of the product being sold as and for Coca-Cola were purchased, as hereinafter set out; no explanation being made on any occasion as to the product so furnished; such drinks and samples being on each occasion drawn from the fourth container to left of carbonated water spigot labeled "Coke"; all of such drinks or samples being of the same general appearance and color as Coca-Cola syrup:

DRINKS PURCHASED AS AND FOR COCA-COLA

March 10-1916, 11:10 a. m. Purchaser, C. N. Robbins; witness, O. N. Normandin.

March 10-1916, 1:00 p. m. Purchaser, O. N. Normandin; witness, C. N. Robbins.

March 10-1916, 5:10 p. m. Purchaser, O. N. Normandin; witness, C. N. Robbins.

March 11-1916, 9:40 a. m. Purchaser, O. N. Normandin; witness C. N. Robbins.

March 11-1916, 12:10 p. m. Purchaser, O. N. Normandin; witness C. N. Robbins.

March 11-1916, 2:50 p. m. Purchaser, O. N. Normandin; witness C. N. Robbins.

March 14-1916, 10:10 a. m. Purchaser, C. N. Robbins; witness, O. N. Normandin.

March 15-1916, 1:40 p. m. Purchaser, C. N. Robbins; witness, O. N. Normandin.

That on three of the above named occasions, as hereinafter set forth, samples were purchased of the product being served and sold as and for Coca-Cola, this deponent on the occasions named handing to the dispenser an empty Thermos bottle, requesting that he sell deponent some Coca-Cola syrup; the product furnished in response to each of such requests being drawn from the same container as drinks just previously served as and for Coca-Cola had been drawn, and without explanation:

SAMPLES PURCHASED AS AND FOR COCA-COLA SYRUP

March 11-1916, 2:50 p. m. Purchaser, O. N. Normandin; witness, C. N. Robbins.

March 14-1916, 10:10 a. m. Purchaser, O. N. Normandin; witness, C. N. Robbins.

March 15-1916, 1:40 p. m. Purchaser, O. N. Normandin; witness, C. N. Robbins.

That immediately following the purchase of each

of the above named samples, this deponent after paying the dispenser for same, accompanied by said Robbins, carried said samples to the office of George N. Reed of the Coca-Cola Company, Los Angeles, California, where said Reed, in the presence of deponent and said Robbins, poured about four ounces of such sample, on each occasion, into a clean bottle, and while said syrup was in the same condition as when purchased, sealed and labeled said bottle; deponent and said Robbins each attaching our signatures to the labels affixed to each of such bottles. Deponent and said Robbins also affixed our signatures to duplicates of each of such labels, and deponent hereto attaches such duplicate labels and makes same a part hereof as Exhibits "A," "B" and "C," respectively.

That deponent and said Robbins then left said samples so sealed and labeled, with said George H. Reed.

Deponent has examined the exhibits attached to the affidavit of H. C. Fuller in this case as Exhibits "C," "D" and "E," respectively, and that said exhibits are the samples so purchased by deponent, and sealed and labeled, as above described, and now contain syrup of the same appearance and color as that so purchased; and that each of said bottles now has thereon the same label so prepared and signed by this deponent and said Robbins, deponent identifying said exhibits by such labels.

Deponent makes this affidavit for use in above stated case. And further, deponent saith not.

O. N. NORMANDIN.

Sworn to and subscribed before me, this 25th day of November, 1916.

(Seal)

ELIZA P. HOUGHTON,

Notary Public in and for the County of Los Angeles,
State of California.

EXHIBIT "A."

Closet No..... Operation.....

Instructions: For each purchase made answer all the questions fully, then paste same to bottle, or other receptacle, containing sample.

Sample No. 1.

Date—March 11th, 1916.

From whom purchased—Orr Pharmacy.

Street address—12th and Maple Ave., city of Los Angeles, state of California.

Hour purchased—2:50 p. m. Amount paid—25c.
What asked for—Coca Cola syrup.

Number of spigot or container in fountain syrup drawn from—4th container to left of carbonated water spigot labeled Coke.

Quantity purchased—8 ozs.

If not drawn from fountain from where drawn—
Describe same and location—

Was syrup for drinks served, drawn from same receptacle as sample?—Yes.

If not from where drawn, describe same and location—

If bottled goods, name of beverage received—

Number of bottles purchased—

Name of seller—Brent Martin. Age—25 yrs.

Height—5 ft. 10 ins. Weight—155 lbs. Build—medium. Color of hair—Black.

Color of eyes—Dark. Complexion—Sallow.

Beard, mustache or smooth face—Smooth. Color of same—

Peculiarities—None.

Seller wore at time of sale—Grey trousers, negligee shirt, striped.

Remarks: F. L. Orr was present and witnessed the purchase. On Maple Ave. show window is the following: "Grace Orr, Prop."

Purchaser—O. N. Normandin, city Los Angeles, state of California.

Witness to purchase C. N. Robbins, city of Los Angeles, state California.

Note: Purchaser and witness to purchase will sign name in full, city they live in, and state, and place some mark after signature for future identification.

Forwarded to F. C. Peace, 1430 Candler Bldg., Atlanta, Ga., via Wells Fargo Express, 1916.

Exhibit "A" to affidavit O. N. Normandin.

EXHIBIT "B."

Closet No..... Operation.....

Instructions: For each purchase made answer all the questions fully, then paste same to bottle, or other receptacle, containing sample.

Sample No. 2. Dated March 14th, 1916.

From whom purchased—Orr Pharmacy.

Street address 12th street and Maple Ave., city of Los Angeles, state Cal.

Hour purchased 10:10 a. m. Amount paid 25c.
What was asked for Coca Cola syrup.

Number of spigot or container in fountain syrup

drawn from 4th to left of carbonated water spigot.
Quantity purchased 8 ozs.

If not drawn from fountain from where drawn—

Describe same and location—

Was syrup for drinks served, drawn from same receptacle as sample?—Yes.

If not from where drawn, describe same and location—

If bottled goods, name of beverage received—

Number of bottles purchased—

Name of seller—Brent Martin. Age—25 yrs.

Height—5 ft. 10 ins. Weight 155 lbs. Build medium. Color of hair black.

Color of eyes dark. Complexion sallow.

Beard, mustache or smooth face—smooth. Color of same—

Peculiarities: None.

Seller wore at time of sale: Gray trousers—negligee shirt.

Remarks: No one else present.

Purchaser—O. N. Normandin, city of Los Angeles, state Cal.

Witness to purchase C. N. Robbins, city Los Angeles, state Cal.

Note: Purchaser and witness to purchase will sign name in full, city they live in, and state, and place some mark after signature for future identifications.

(Ex. "B" to affidavit O. N. Normandin.)

EXHIBIT "C."

Closet No..... Operation.....

Instructions: For each purchase made answer all

the questions fully, then paste same to bottle, or other receptacle, containing sample.

Sample No. 3. Dated March 15th, 1916.

From whom purchased—Orr Pharmacy.

Street address 12th St. and Maple Ave., city Los Angeles, state Cal.

Hour purchased 1:40 p. m. Amount paid 25c. What was asked for—Coca Cola syrup.

Number of spigot or container in fountain syrup drawn from 4th to left of carbonated water spigot. Quantity purchased 8 ozs.

If not drawn from fountain from where drawn—

Describe same and location—

Was syrup for drinks served, drawn from same receptacle as sample? Yes.

If not from where drawn, describe same and location—

If bottled goods, name of beverage received—

Number of bottles purchased—

Name of seller—Brent Martin. Age—25 yrs.

Height—5 ft. 10 ins. Weight 155 lbs. Build medium. Color of hair black.

Color of eyes—dark. Complexion—sallow.

Beard, mustache or smooth face—smooth. Color of same—

Peculiarities: None.

Seller wore at time of sale: Gray trousers—negligee shirt.

Remarks: F. L. Orr was present at the time purchase was made.

Purchaser—O. N. Normandin, city Los Angeles, state Cal.

Witness to purchase—C. N. Robbins, city Los Angeles, state Cal.

Note: Purchaser and witness to purchase will sign name in full, city they live in, and state, and place some mark after signature for future identifications.

(Exhibit "C" to affidavit O. N. Normandin.)

[Endorsed]: No. C 63 Eq. In equity. In the Dist. Court of the U. S., for the Southern District of California, Southern Division. The Coca Cola Co., complainant, vs. Rose Orr and Frank L. Orr, doing business as Orr Drug Co. or Orr Pharmacy, defendants. Affidavit of O. N. Normandin. Filed Dec. 11, 1916. Wm. M. Van Dyke, clerk; by Chas. N. Williams, deputy clerk. Candler, Thomson & Hirsch, attorneys and counsellors at law, 1430 Candler Building, Atlanta, Ga.

In the District Court of the United States for the Southern District of California, Southern Division.

THE COCA COLA COMPANY,

Complainant,

VERSUS

ROSE ORR and FRANK L. ORR, doing business as
ORR DRUG COMPANY, or ORR PHARMACY,

Defendants.

In Equity. No.

Application for Injunction, &c.

Affidavit of H. C. Fuller.

United States of America, District of Columbia.

Before me, a notary public in and for said District of Columbia, personally appeared H. C. Fuller, who,

being first duly sworn in above-stated case, on oath deposes and says:

That he is a resident of the city of Washington, District of Columbia, and that he is over twenty-one years of age. Deponent states that he received his education at the Worcester Polytechnic Institution, Worcester, Massachusetts. That deponent has had about fourteen years' experience as a chemist since leaving that institution; that for four years, deponent was connected with the Bureau of Agriculture at Washington, D. C. That prior to that time, deponent was connected with the Mallinckradt Chemical Works, of New York City, and also, engaged in experimental work with Parke, Davis & Company, of Detroit, Michigan, and Boston, Massachusetts, and New York.

Besides the above, deponent states that he has for many years, being doing analytical work in soft drinks, and kindred matters, and has had many years of experience in that work, and that said experience has given him intimate knowledge of analytical methods of examination of food products.

That for many years past, deponent has been familiar with the product known and sold as Coca-Cola, and that during the past four years, deponent has made many analytical examinations of said product Coca-Cola, and is familiar with the constituents which go to compose said product. Deponent states that his analytical examination of Coca-Cola shows that said product is colored with caramel. That caramel is a coloring matter which is produced by the heating of sugar to a certain temperature.

Deponent states that from his experience in analyti-

cal work, and with food and drug products, that said caramel in Coca-Cola is a purely decorative feature of Coca-Cola, and has no effect of any nature whatsoever on the consumer, except that it tends to give the product in which it is contained a very pleasing appearance and that it is not at all a necessary or structural feature of said product. Deponent states that there are many other colorings that could be used to make a successful commercial product and which would be no more expensive than caramel.

Deponent states that he has known of the product Coca-Cola for many years, and that one of the means of distinguishing Coca-Cola is by the color of said product, and that from long use of said coloring in said product Coca-Cola, it has become associated with said product, and is a means of identifying said product Coca-Cola.

That on or about September 3rd, 1915, this deponent received by express, from Los Angeles, California, two samples of syrup, of the same general appearance and color of the product of complainant herein. That said samples were securely sealed and labeled when so received, the labels on said samples showing that same had been purchased at the store of defendants herein, corner Twelfth and Maple avenues, Los Angeles, California, by H. B. Pierce, in the presence of O. N. Normandin, on August 26th and 27th, 1915, respectively.

That said samples were marked by this deponent for identification, "46a" and "47a," in the order of purchase above named.

That on or about March 31st, 1916, this deponent received from Atlanta, Georgia, three samples of syrup

of the same general appearance and color of the product of complainant herein. That said samples were securely sealed and labeled when so received, the labels on said samples showing that same had been purchased at the place of business of defendant herein, by O. N. Normandin, in the presence of C. N. Robbins, on March 11th, 14th and 15th, 1916, respectively, as and for Coca-Cola. Said bottles also had thereon the numbers "2430," "2431" and "2432" when so received by deponent.

Deponent states that immediately upon receipt of said two lots of samples, and while said samples were in the same condition as when received by deponent, no change having been made in said syrup from the time deponent received same by express as above described, deponent broke the seals on each of said bottles, and a part of the syrup was taken from each of such bottles for the purpose of making an analytical examination thereof, in order to determine whether or not the syrup contained therein was Coca-Cola, the product of the complainant in above-stated case.

Deponent states that said analytical examination of said samples as above set out shows that said product in all of said bottles was colored with artificial coloring, caramel, and that without said coloring, said samples would not be of the color which deponent found, and that said caramel is merely a decorative, and not a structural feature of said product, and not in any way necessary for a commercially successful product.

Deponent made a further analytical examination of said samples for the purpose of ascertaining if same was the product of the complainant, and deponent states

that none of said samples was the product manufactured and sold by complainant in above case as Coca-Cola. That there were many differences in said product from the product of the complainant. That as a result of said analytical examination of said samples, deponent shows that the following differences were shown between said samples and genuine Coca-Cola syrup, to wit:

	Specific Gravity	Phosphoric Acid	Caffeine
Coca-Cola Syrup:	1.259	.21%	.19%
(#46a) Ex. "A,"	1.2629	.31%	.12%
(#47a) Ex. "B,"	1.2625	.31%	.13%
(#2430) Ex. "C,"	1.280	.23%	.08%
(#2431) Ex. "D,"	1.280	.23%	.08%
(#2432) Ex. "E,"	1.280	.23%	.08%

showing a difference between all of said samples and genuine Coca-Cola in the specific gravity, the phosphoric acid and the caffeine content; and that in addition, the flavor and odor of each of said samples was distinct from the flavor and odor of genuine Coca-Cola syrup.

Deponent hereto attaches said bottles so received by deponent, each containing a portion of the syrup contained therein when so received, and each bearing the same label thereon when so received, and makes same a part hereof, as Exhibits A, B, C, D and E, respectively.

From the result of said analysis, this deponent states that said samples so examined by him are not Coca-Cola syrup made by complainant in the above-stated case.

Deponent makes this affidavit for use in above-stated case. And further, deponent saith not.

HARRY C. FULLER.

Sworn to and subscribed before me, this 31st day of October, 1916.

(Seal) REGINALD RUTHERFORD,
Notary Public, City of Washington, District of Columbia.

[Endorsed]: No. C 63 Eq. In equity. In the Dist. Court of the United States for the Southern District of California, Southern Division. The Coca Cola Co., complainant, vs. Rose Orr and Frank L. Orr, doing business as Orr Drug Co., defendants. Affidavit of H. C. Fuller. Filed Dec. 11, 1916. Wm. M. Van Dyke, clerk; by Chas. N. Williams, deputy clerk. Candler, Thomson & Hirsch, attorneys and counsellors at law, 1430 Candler Building, Atlanta, Ga.

*In the District Court of the United States for the
Southern District of California, Southern Di-
vision.*

THE COCA COLA COMPANY,

Complainant,

VERSUS

ROSE ORR and FRANK L. ORR, doing business
as ORR DRUG CO., or ORR PHARMACY,
Defendants.

In Equity. No.

Application for Injunction, &c.

Affidavit of H. M. Lloyd.

State of California, County of Los Angeles.

Before me, a notary public in and for said state and county, personally came H. M. Lloyd, who, being first duly sworn in above-stated case, on oath deposes and says that he is over twenty-one years of age, and resides in the city of Los Angeles, state of California.

That deponent is, and has been for some time past, familiar with the product Coca-Cola manufactured by complainant herein, deponent's familiarity with such product having been gained through consumption thereof.

That during the latter part of August, 1915, H. B. Pierce of Atlanta, Georgia, was in the city of Los Angeles; and that at the request of said Pierce, this deponent in conjunction with C. N. Robbins, of Los Angeles, made several purchases at the store of defendants herein, located corner Twelfth and Maple streets, in said city of Los Angeles; the visits so made by deponent and said Robbins being as follows and on occasions as named, requests were made to be served with the product Coca-Cola:

Aug. 26-1915, 11:15 a. m. Purchaser, H. M. Lloyd. Witness, C. N. Robbins. Drink served as and for Coca-Cola, drawn from 4th spigot to left of carbonated water spigot, labeled "Coke."

That after drinking above product, this deponent entered into conversation with Mr. Orr, who was near the fountain; and at the conclusion of this conversation, deponent called to said Robbins, asking the said Robbins if he wanted another drink; and deponent then

said, "I want a drink of Coca-Cola," and Mr. Orr hearing this remark, called to the dispenser at the fountain requesting that he serve this deponent with a Coca-Cola. In response to this request the dispenser then drew a product from the same container as drink previously served deponent as and for Coca-Cola had been drawn, and served same without explanation.

Aug. 26-1915, 4:15 p. m. Purchaser, H. M. Lloyd. Witness, C. N. Robbins. Drink served as and for Coca-Cola, drawn from 4th spigot left of carbonated water spigot, labeled "Coke."

Aug. 27-1915, 9:55 a. m. Purchaser, H. M. Lloyd. Witness, C. N. Robbins. Drink served as and for Coca-Cola, drawn from 4th spigot left of carbonated water spigot, labeled "Coke."

Aug. 27-1915, 3:20 p. m. Purchaser, H. M. Lloyd. Witness, C. N. Robbins. Drink served as and for Coca-Cola, drawn from 4th spigot, left of carbonated water spigot, labeled "Coke."

That the product served on each of the above-named occasions, was served as and for Coca-Cola, and without explanation; and was on each occasion, of the same general appearance and color as Coca-Cola syrup.

Deponent makes this affidavit for use in above-stated case. And further, deponent saith not.

H. M. LLOYD. (Seal)

Sworn to and subscribed before me, this 25th day of November, 1916.

(Seal)

ELIZA P. HOUGHTON,

Notary Public, in and for the County of Los Angeles,
State of California.

[Endorsed]: No. C 63 Eq. In equity. In the Dist

Court of the U. S., for the Southern Dist. of California, Southern Division. The Coca Cola Co., complainant, vs. Rose Orr and Frank L. Orr, doing business as Orr Drug Co., or Orr Pharmacy, defendants. Affidavit of H. M. Lloyd. Filed Dec. 11, 1916. Wm. M. Van Dyke, clerk; by Chas. N. Williams, deputy clerk. Candler, Thomson & Hirsch, attorneys and counsellors at law, 1430 Candler Building, Atlanta, Ga.

In the District Court of the United States for the Southern District of California, Southern Division.

THE COCA COLA COMPANY,

Complainant,

VERSUS

ROSE ORR and FRANK L. ORR, doing business
as ORR DRUG COMPANY, or ORR PHARMACY,

Defendants.

In Equity. No.

Application for Injunction, &c.

Affidavit of F. C. Peace.

State of Georgia, County of Habersham.

Before me, a notary public in and for said state and county, personally came F. C. Peace, who, being first duly sworn in the above entitled case, on oath deposes and says:

That he is over twenty-one years of age and resides in the city of Atlanta, state of Georgia.

That deponent is and has been for some time past in the employment of the Coca Cola Company, complain-

ant herein; and that during the time hereinafter referred to this deponent had charge, on behalf of the complainant, of the investigation as to such sales of substitute products; and that deponent continued in charge of such investigation until recently.

That the records of complainant showing that samples had been purchased at the place of business of defendants herein during the month of August, 1915, which samples, upon analytical examination being made, were found not to be Coca Cola, the product of complainant; and complainant having continued to receive reports that a substitute was being sold as and for its product by said defendants, this deponent, during the month of March, 1916, requested George H. Reed of the Coca Cola Company of Los Angeles, California, to have an investigation made at the place of business of defendants herein, corner Twelfth and Maple avenues in said city of Los Angeles; that said Reed, in accordance with such request, had such investigation made by O. N. Normandin and C. N. Robbins of Los Angeles and duly reported the result of such investigation to this deponent.

That on March 24th, 1916, this deponent received by express from Los Angeles, California, three samples of a product of a dark brownish color, sealed and labeled, and showing that same had been purchased on March 11th, 14th and 15th, 1916, respectively, as and for Coca Cola by O. N. Normandin in the presence of C. N. Robbins at the place of business of defendants herein.

That deponent, upon receipt of such samples, affixed thereto, in order of purchase above named, the numbers

"2430," "2431" and "2432" respectively for identification by deponent and while so sealed and labeled and in the same condition as when received, with the addition of the numbers above named, deponent, on March 28th, 1916, packed said three samples of syrup and shipped same by Southern Express to Dr. H. C. Fuller, Washington, D. C., for analytical examination.

That on April 12th, 1916, said Dr. H. C. Fuller reported to deponent that said samples so analyzed were not Coca Cola, the product of complainant herein.

Deponent states that he has examined the exhibits attached to the affidavit of H. C. Fuller in this case as Exhibits "C," "D" and "E" respectively and that said exhibits are the samples so received and shipped by deponent to said Dr. H. C. Fuller as hereinabove set forth; and contain the same labels thereon when so received and shipped, with the numbers placed thereon by this deponent.

Deponent makes this affidavit for use in above stated case. And further deponent saith not.

F. C. PEACE.

Sworn and subscribed before me this 30th day of October, 1916.

(Seal)

PLUMER DUCKETT, N. P.

[Endorsed]: No. C 63 Eq. In equity. In the Dist. Court of the U. S. for the Southern District of California, Southern Division. The Coca Cola Co., complainant, vs. Rose Orr and Frank L. Orr, doing business as Orr Drug Co., or Orr Pharmacy, defendant. Affidavit of F. C. Peace. Filed Dec. 11, 1916. Wm. M. Van Dyke, clerk; by Chas. N. Williams, deputy

clerk. Candler, Thomson & Hirsch, attorneys and counsellors at law, 1430 Candler Building, Atlanta, Ga.

In the District Court of the United States for the Southern District of California, Southern Division.

THE COCA COLA COMPANY,

Complainant,

VERSUS

ROSE ORR and FRANK L. ORR, doing business
as ORR DRUG COMPANY, or ORR PHARMACY,

Defendants.

In Equity. No.

Application for Injunction, &c.

Affidavit of George H. Reed.

State of California, County of Los Angeles.

Before me, a notary public in and for said state and county, personally came George H. Reed, who, being first duly sworn in above stated case, on oath deposes and says: That he is over twenty-one years of age and resides in the city of Los Angeles, California.

That deponent is and has been for some time past manager of the Coca Cola Company of Los Angeles, deponent as such being in charge of the branch factory of the Coca Cola Company of Atlanta, Georgia, located in said city of Los Angeles.

That various reports having been received by complainant as to the sale of other products by defendants herein as and for Coca Cola, at their place of business in the city of Los Angeles, located corner

Twelfth and Maple avenues, this deponent, at the suggestion of F. C. Peace of the Coca Cola Company, Atlanta, Georgia, undertook to have an investigation made at the place of business of said defendants; and on or about March 11th, 1916, this deponent requested O. N. Normandin of Los Angeles to visit the store of defendants, accompanied by a witness, for the purpose of making test purchases of the product being sold at said place of business as and for Coca Cola, the product of complainant. That said Normandin, in conjunction with C. N. Robbins, beginning with March 11th, 1916, called at said store on several occasions, where purchases were made of such product, reporting to this deponent as such investigation progressed.

That on March 11th, 14th and 15th, 1916, respectively, said Normandin, accompanied by C. N. Robbins, came to the office of this deponent, presenting to this deponent, on each of such occasions, a thermos bottle containing syrup of a dark brownish color and informing deponent that same had been purchased at the store of defendants herein as and for Coca Cola. That this deponent on each of such occasions emptied about four ounces from such thermos bottle into a clean empty bottle and in the presence of said Normandin and Robbins, then securely sealed such bottle on each occasion. That this deponent on each of such occasions placed, under the direction of O. N. Normandin and C. N. Robbins, a label in duplicate, giving full information as to the purchase of such sample, said Normandin and Robbins then attaching their signatures to the label and the duplicate thereof on each occasion. This deponent on each of such occasions attached one

of such labels to the bottle so sealed, delivering the other label to said Normandin.

That this deponent retained said bottles so sealed and labeled in his possession until March 18th, 1916, when this deponent packed said three samples and shipped same while in the same condition as when so delivered to deponent and sealed as above stated to F. C. Peace, Atlanta, Georgia, by Wells Fargo Express.

Deponent has examined the exhibits attached to the affidavit of O. N. Normandin in this case as Exhibits "A," "B" and "C" respectively and that said exhibits are the duplicates of such labels so attached to said bottles as above described.

That deponent has examined the exhibits attached to the affidavit of H. C. Fuller in this case as Exhibits "C," "D" and "E" respectively and that said exhibits are the samples so obtained, sealed and shipped by deponent as above set forth; and now each contain syrup of the same appearance and color as that so placed therein; as well as the original label placed thereon by deponent, deponent identifying such exhibits by said labels.

Deponent makes this affidavit for use in above case. And further deponent saith not.

GEORGE H. REED.

Sworn to and subscribed before me this 25th day of November, 1916.

(Seal)

ELIZA P. HOUGHTON,

Notary Public in and for the County of Los Angeles,
State of California.

[Endorsed]: No. C 63 Eq. In equity. In the Dist.
Court of the U. S., for the Southern District of Cali-

ifornia, Southern Division. The Coca Cola Co., complainant, vs. Rose Orr and Frank L. Orr, doing business as Orr Drug Co., or Orr Pharmacy, defendants. Affidavit of Geo. H. Reed. Filed Dec. 11, 1916. Wm. M. Van Dyke, clerk; by Chas. N. Williams, deputy clerk. Candler, Thomson & Hirsch, attorneys and counsellors at law, 1430 Candler Building, Atlanta, Ga.

*In the District Court of the United States for the
Southern District of California, Southern Di-
vision.*

THE COCA COLA COMPANY,

Complainant,

vs.

ROSE ORR and FRANK L. ORR, doing business
as ORR DRUG COMPANY, or ORR PHAR-
MACY,

Defendants.

In Equity. No.

Application for Injunction, &c.

Affidavit of C. N. Robbins.

State of Arizona, County of Yavapai.

Before me, a notary public in and for said state and county, personally came C. N. Robbins, who, being first duly sworn in above-stated case, on oath deposes and says:

That he is over twenty-one years of age, and resides in the city of Los Angeles, state of California.

That deponent is, and has been, for some time past, familiar with the product Coca-Cola, manufactured by complainant herein, deponent's familiarity with such

product having been gained through consumption thereof.

That during the latter part of August, 1915, H. B. Pierce of Atlanta, Georgia, was in the city of Los Angeles; and that at the request of said Pierce, deponent in conjunction with H. M. Lloyd of Los Angeles, made several purchases at the store of defendants herein, located corner Twelfth and Maple streets, in said city of Los Angeles, of the product being served at said store as and for Coca-Cola.

That deponent has read the affidavit of said Lloyd in this case as to such purchases so made, and that same is true and correct as to all such purchases; and that same were made at the times, and in the manner therein set forth; the product served on each of such occasions being sold in response to calls for Coca-Cola, and being sold as and for Coca-Cola, without explanation.

That the product so served on each occasion was of the same general appearance and color as Coca-Cola syrup.

That during the month of March, 1916, this deponent at the request of O. N. Normandin of Los Angeles, assisted said Normandin in making purchases at defendants' place of business of the product being sold as and for Coca-Cola.

That deponent has read the affidavit of said Normandin in this case; and that same is true and correct as to all such purchases therein stated to have been made in the presence of this deponent, and that each and all of such purchases were made at the times, and in the manner therein set forth; the product served

on each of such occasions being of the same general appearance and color as Coca-Cola, and being sold without explanation.

That the samples stated in the affidavit of said Normandin to have been purchased in deponent's presence were so purchased on March 11th, March 14th and March 15th, 1916, as therein stated; each of such samples being sold as and for Coca-Cola syrup, and without explanation as to the product furnished.

That immediately following the purchase of each of such samples, same were carried by said Normandin and this deponent to the office of George H. Reed of the Coca-Cola Company, Los Angeles, California, where said Reed, in the presence of this deponent and said Normandin, poured about four ounces of such sample into a clean bottle, and while said syrup was in the same condition as when purchased, sealed and labeled said bottle, deponent and said Normandin each attaching our signatures to the label affixed to each of such bottles on each occasion. Deponent and said Normandin also affixed our signatures to duplicates of each of such labels.

Deponent has examined the exhibits attached to the affidavit of said Normandin in this case as Exhibits "A," "B" and "C," respectively; and that said exhibits are the duplicate labels so prepared and signed at the time of sealing and labeling such bottles.

That deponent has examined the exhibits attached to the affidavit of H. C. Fuller in this case as Exhibits "C," "D" and "E," respectively; and that said exhibits are the samples so purchased, sealed and labeled; and now each contain a portion of syrup of the same

appearance and color as that so purchased; deponent identifying said bottles by the labels thereon.

Deponent makes this affidavit for use in above stated case. And further, deponent saith not.

C. N. ROBBINS.

Sworn to and subscribed before me, this 4th day of December, 1916.

(Seal)

F. A. HATHAWAY,

Notary Public, Yavapai County, State of Arizona.

My commission expires June 10, 1918.

[Endorsed]: No. C 63 Eq. In equity. In the Dist. Court of the U. S. for the Southern District of California, Southern Division. The Coca Cola Co., complainant, vs. Rose Orr and Frank L. Orr, doing business as Orr Drug Co., or Orr Pharmacy, defendants. Affidavit of C. N. Robbins. Filed Dec. 18, 1916. Wm. M. Van Dyke, clerk; by Chas. N. Williams, deputy clerk. Candler, Thomson & Hirsch, attorneys and counsellors at law, 1430 Candler Building, Atlanta, Ga.

In the District Court of the United States for the Southern District of California, Southern Division.

THE COCA COLA COMPANY,

Complainant,

VERSUS

ROSE ORR and FRANK L. ORR, doing business as ORR DRUG COMPANY, or ORR PHARMACY,

Defendants.

In Equity. No. C 63.

Affidavit of W. R. Dickinson.

State of California, County of Los Angeles—ss.

W. R. Dickinson, being first duly sworn, deposes and says that he resides at Los Angeles, California, and has a place of business at Third and Main street in said city.

That he has never sold any Coca Cola or any drink or beverage similar to Coca Cola to Frank L. Orr, Rose Orr, or The Orr Pharmacy, situated at Twelfth street and Maple avenue in said city, excepting one gallon of Coca Cola between December 25, 1916, and Jan. 1, 1917, to the best of my knowledge and belief.

W. R. DICKINSON.

Subscribed and sworn to before me this 4th day of January, A. D. 1917.

(Seal)

EARLE LOPEZ,

Notary Public, Los Angeles County and State of California.

[Endorsed]: No. C-63 Eq. In the United States District Court, in and for the Southern District of California, Southern Division. The Coca Cola Company, complainant, vs. Rose Orr *et al.*, defendants. Affidavit of W. R. Dickinson. Filed Jan. 5, 1917. Wm. M. Van Dyke, clerk; by T. F. Green, deputy clerk. O'Melveny, Stevens & Millikin, suite 825 Title Insurance Bldg., N. E. corner Fifth & Spring Sts., Los Angeles, Cal.

*In the District Court of the United States for the
Southern District of California, Southern Di-
vision.*

THE COCA COLA COMPANY,

Complainant,

VERSUS

ROSE ORR and FRANK L. ORR, doing business
as ORR DRUG COMPANY, or ORR PHAR-
MACY,

Defendants.

In Equity. No. C 63.

Affidavit of Edward Kruell.

State of California, County of Los Angeles—ss.

Edward Kruell, being first duly sworn, deposes and says that he resides at Los Angeles, California, and has a place of business at Sixteenth and Grand avenue in said city.

That to the best of his knowledge and belief he has never sold any syrup of Coca Cola or any drink or beverage similar to syrup of Coca Cola, to Frank L. Orr, Rose Orr, or The Orr Pharmacy, situated at Twelfth street and Maple avenue in said city.

EDWARD KRUELL.

Subscribed and sworn to before me this 5th day of January, A. D. 1917.

(Seal)

A. D. AVERILL,

Notary Public, Los Angeles County and State of California.

[Endorsed]: C-63 Eq. In the United States District Court, in and for the Southern District of California. Southern Division. The Coca Cola Company,

complainant, vs. Rose Orr *et al.*, defendants. Affidavit of Edw. Kruell. Filed Jan. 5, 1917. Wm. M. Van Dyke, clerk; by T. F. Green, deputy clerk. O'Melveny, Stevens & Millikin, suite 825 Title Insurance Bldg., N. E. corner Fifth & Spring Sts., Los Angeles, Cal.

*In the District Court of the United States for the
Southern District of California, Southern Di-
vision.*

THE COCA COLA COMPANY,

Complainant,

VERSUS

ROSE ORR and FRANK L. ORR, doing business
as ORR DRUG COMPANY, or ORR PHAR-
MACY,

Defendants.

In Equity. No. C 63.

Affidavit of Frank L. Orr.

State of California, County of Los Angeles—ss.

Frank L. Orr, being first duly sworn, deposes and says: That he is one of the defendants in the above-entitled action; that he has read the bill of complaint herein and has examined the affidavits filed for an injunction against Rose Orr and this affiant.

This affiant further says that the defendant, Rose Orr, is his wife; that she is doing business and conducting a drug store and soda fountain at a storeroom, being No. 1200 Maple avenue in the city of Los Angeles, namely, at the corner of Twelfth street and Maple avenue in said city. That said Rose Orr is doing business under the fictitious name and style of the "Orr's

Pharmacy." That she has complied with the laws of the state of California by publication and filing certificate of business under a fictitious firm name and that she has been so conducting said business since the 3rd day of May, 1915, and is now so conducting the same at said place. That this affiant is employed to manage said business and carry the same on by the defendant, Rose Orr, and has at all times so done.

This affiant further says that there is in said store a soda fountain where carbonated drinks and other drinks are sold to the public. That said soda fountain has eight spigots, four on each side of the central carbonated water spigot. That to the left of said central carbonated water spigot the inscriptions upon the said spigots beginning at the fourth to the left are as follows: "Lemon"; "Cream"; "W. Cherry"; and "Coke"; that to the right of said central carbonated water spigot the inscription upon the said spigots read, beginning next to said central spigot and reading towards the right, as follows: "Root Beer"; "Rasp'ry"; "Ginger" and "Coca Cola." That said fountain has been thus arranged during all the time since May, 1915, and prior thereto and is now so arranged. That a correct photograph of the face of said fountain is filed herewith, marked "Defendant's Exhibit 1," and the same is hereby referred to for more particulars and in order to show the said fountain with the said spigots and their inscriptions as well as possible.

That at all times the fourth spigot to the right of the central carbonated water spigot has been inscribed as it is now, namely, "Coca Cola," and at all times since May, 1915, and all other times and at the present

time, if any customer asks for Coca Cola that the syrup to be carbonated as such has been drawn from this spigot, namely, the fourth to the right from said carbonated water spigot and from no other.

This affiant expressly says that he has never sold anything than Coca Cola for Coca Cola in said store, nor allowed any such sale to be made by any agent or clerk.

This affiant further says that an enlarged photograph of the last three spigots of the said fountain designated and marked as above stated is also furnished herewith to show the same more clearly, the same being marked "Defendant's Exhibit 2," and being hereby referred to for more particulars.

This affiant further says that he has read a certain affidavit made by O. N. Normandin and dated November 25th, 1916; that neither this affiant nor the said Rose Orr, doing business as aforesaid, have ever sold, or allowed to be sold, at said place of business, namely, at the corner of Twelfth street and Maple avenue, in the city of Los Angeles, any substance or drink as "Coca Cola" which was not in truth and in fact Coca Cola; that the syrup of Coca Cola was always purchased by him and purchased from persons dealing directly with the Coca Cola Company in Los Angeles, or its agent, the Western Wholesale Drug Company, and was in truth and in fact Coca Cola syrup and nothing else and that this affiant never, at any time, nor did, as this affiant is informed and believes, Rose Orr, one of the defendants herein, ever sell, or authorize to be sold at his said place of business, or at any other place, any drink as Coca Cola which was not

Coca Cola, the basis and substance of which, namely, the syrup of Coca Cola, had been purchased from The Coca Cola Company, or its agency in Los Angeles. This affiant expressly says that never, at any time, did he sell or deliver to any person or persons, either the plaintiff herein, or any agent, servant or detective of said plaintiff mentioned in the complaint, or in any affidavit filed with the complaint herein asking said injunction, nor to any other person, any of the syrup used in connection with carbonated water in making the drink, Coca Cola, or any substitute thereof, and this defendant says that he never authorized, and upon information and belief says, said Rose Orr never authorized the sale of any of the said syrup in any way or manner at any time to any person, and never knew of the same being sold and taken away by any person and this affiant believes that all such statements in the bill of complaint herein, or in any affidavit filed herein, is wholly false.

That any statement or statements in the bill of complaint of the plaintiff, The Coca Cola Company, or in any affidavit filed therewith in this court to the contrary of said statement, is wholly false and based upon a misunderstanding of the facts.

This defendant and affiant further says that by the affidavit of H. M. Lloyd filed herein that it is made to appear to this court that in response to requests for drink of Coca Cola that this affiant called to the dispenser of the fountain requesting that he serve the said deponent, namely, said Lloyd, with a Coca Cola. That the said Lloyd states that in response to said request that the said dispenser drew a product from the same

container previously served deponent as and for Coca Cola. That said service was had on the 26th and 27th days of August, 1915, and that one C. N. Robbins was a witness to said transactions; that said affidavit proceeds to state, in each case, that said "Drink served as and for Coca Cola was drawn from 4th spigot left of carbonated water spigot labeled 'Coke.' "

This affiant says that the labels upon his soda fountain have been identical for at least six years last past; that the first spigot to the left of the said carbonated water spigot has been and is now labeled "Coke"; that the fourth spigot to the right of said carbonated water spigot has been at all times and is now labeled "Coca Cola" and that there has never been any change in said matter and that the said Lloyd and other affiants are mistaken as to the facts in said case. Affiant again refers to "Defendant's Exhibits 1 and 2" filed herewith, showing the face of said fountain and the said spigots and their labels.

This affiant states that the bill of complaint in this case was verified on the 22nd day of October, 1916; that the affidavit of O. N. Normandin was verified on the 25th day of November, 1916; that the affidavit of Charles H. Candler was verified on the 27th day of October, 1916; that the affidavit of H. M. Lloyd was verified on the 25th day of November, 1916; that the affidavit of H. B. Pierce was verified on the 2nd day of November, 1916; that the affidavit of S. C. Dobbs was verified on the 27th day of October, 1916; that the affidavit of George H. Reed was verified on the 25th day of November, 1916; that the affidavit of Harry C. Fuller was verified on the 31st day of October, 1916;

that the affidavit of F. C. Peace was verified on the 30th day of October, 1916.

This affiant further says that the alleged purchases referred to in the affidavits herein, of some spurious and inferior drink in the place of Coca Cola, were made upon the following named dates, to-wit, that in the affidavit of O. N. Normandin it is alleged that the said Normandin and one C. N. Robbins were present at the store of the said Rose Orr and that on March 10th, 1916, 3 drinks were taken; also 3 on March 11th, 1916; one on March 14th, 1916, and one on March 15th, 1916; that it is stated that both of said parties were present at each of said times and that the drink had was from the fourth spigot at the left from the central carbonated water spigot of said soda fountain; that in truth and in fact, when sitting in front of said fountain that the fourth spigot at the left is and at all times has been marked "Coca Cola" and that this affiant believes that in truth and in fact said drink was furnished to said parties from said spigot and this affiant alleges of his own knowledge that nothing but true Coca Cola syrup was ever placed in the receptacle drawn from said spigot.

That it is also stated in the affidavit of said Normandin that on March 11th, 14th and 15th, 1916, that samples of syrup were purchased at said store, being drawn, as is alleged, from the same spigot, namely, the fourth spigot to the left from the carbonated water spigot. This affiant expressly says that he never sold syrup from said fountain to any person, nor does he know of it having been sold by any person and he says, upon information and belief, that it was never so sold,

either to the said Normandin or Robbins, or any other person, but that if taken from the fourth spigot to the left of the central carbonated water spigot of said fountain that in truth and in fact the syrup so purchased was true Coca Cola as herein stated.

This affiant further says that in the affidavit of H. M. Lloyd it is alleged that drinks were purchased at said fountain on August 26th, 1915, and August 27th, 1915, by the said Lloyd and C. N. Robbins. That it is alleged that said drinks were taken from the fourth spigot to the left in said fountain. That if said drinks were so taken as alleged that the syrup from which the same was made was, to the knowledge of this affiant, true Coca Cola and nothing else and not an inferior or spurious article, nor anything other than Coca Cola; this affiant further says that in the affidavit of H. B. Pierce it is alleged that two drinks were purchased at said fountain on August 26th, 1915, and two drinks on August 27th, 1915, the said O. N. Normandin being present. That said drinks were alleged to have been taken from the fourth spigot to the left of said fountain and this affiant alleges that if in truth and in fact said drinks were so taken that the syrup from which the same was made was Coca Cola syrup and nothing else.

This affiant further says that he understands from Brent Martin that he was at one time asked by two persons to furnish them with root beer in a bottle and that he did so. That this affiant was not present at said time and does not know in regard to said transaction other than the statements made by said Martin.

This affiant further says that he has heretofore pur-

chased Coca Cola syrup from persons representing to him that they purchased the same from the Western Wholesale Drug Company, the general agent in Los Angeles, as this affiant is informed and believes, of the Coca Cola Company, the plaintiff herein, namely, from R. C. Wrede, 1200 San Pedro street, Los Angeles; from Edward Krull, Sixteenth street and Grand avenue in said city and from Dr. Dickinson at Third and Main streets in the city of Los Angeles.

That this affiant commonly bought by the gallon, whereas the said druggists from whom he purchased, bought from the said agency of The Coca Cola Company by the barrel.

That this affiant always acted in said matter, so far as he knew, in good faith and never offered or attempted to offer any other drink than Coca Cola as and for Coca Cola, nor desired so to do and that he does not believe that any person whatever ever asked for Coca Cola at the store of the Orr's Pharmacy without receiving Coca Cola and that all statements to the contrary in the bill of complaint of the plaintiff, or in any affidavit filed herein, is false and founded upon a mistake.

That this affiant and the said Rose Orr had no desire to mislead the public and no intention of so doing and that in truth and in fact they have not so done.

That this affiant has never been requested by the plaintiff, or its agents, or by any person, to desist from the sale of Coca Cola, or any product sold by this affiant as Coca Cola, nor has the said Rose Orr, so far as known to this affiant, been requested, nor the said Orr's Pharmacy.

This affiant further says that he is still selling Coca Cola at his said fountain drawn from the same spigot as heretofore, viz.: the fourth to the left of the carbonated water spigot as you sit or stand in front of said fountain. That this affiant himself filled a bottle of the syrup of Coca Cola from said spigot and has marked the same "Defendants' Exhibit 3" and he herewith files the same with the court in order to show the color and contents thereof.

And further affiant saith not.

FRANK L. ORR.

Subscribed and sworn to before me this 30th day of December, 1916.

(Seal)

SIDNEY J. PARSONS,

Notary Public in and for the County of Los Angeles,
State of California.

[Endorsed]: Original. No. C 63. In the District Court of the United States, Southern District of California, Southern Division. The Coca Cola Company, complainant, versus Rose Orr & Frank L. Orr, doing business as Orr Drug Company, or Orr Pharmacy, defendants. In equity. Affidavit of Frank L. Orr. Filed Jan. 5, 1917. Wm. M. Van Dyke, clerk; by T. F. Green, deputy clerk. S. J. Parsons, atty. for Frank L. Orr.

*In the District Court of the United States for the
Southern District of California, Southern Di-
vision.*

THE COCA COLA COMPANY,

Complainant,

VERSUS

ROSE ORR and FRANK L. ORR, doing business
as ORR DRUG COMPANY, or ORR PHAR-
MACY,

Defendants.

In Equity.

Affidavit of R. C. Wrede.

State of California, County of Los Angeles—ss.

R. C. Wrede, being first duly sworn, deposes and says: that he resides at Los Angeles, California: he has a place of business at No. 1200 San Pedro street in said city. That this affiant has been in the habit of buying Coca Cola from the general agent of The Coca Cola Company in the city of Los Angeles, namely, The Western Wholesale Drug Company, having a place of business at Second and Los Angeles streets in said city of Los Angeles.

That this affiant has also been in the habit of selling to different dealers and druggists Coca Cola by the gallon, this affiant having purchased the same by the barrel. That among other customers of this ffiant has been the Orr Pharmacy, conducted or managed by Frank L. Orr, the said place of business of said Orr Pharmacy being at Twelfth street and Maple avenue in the said city of Los Angeles. That this affiant has sold considerable amounts of Coca Cola

to the said Orr Pharmacy for a number of years last past and since about 1914 or January, 1915.

This affiant is positive that the product sold to the said Orr Pharmacy by him was the syrup of Coca Cola.

And further this affiant saith not.

R. C. WREDE.

Subscribed and sworn to before me this 29th day of December, 1916.

(Seal)

SIDNEY J. PARSONS,

Notary Public in and for the County of Los Angeles,
State of California.

[Endorsed]: Original. No. C 63. In the District Court of the United States, Southern District of California, Southern Division. The Coca Cola Company, complainant, versus Rose Orr & Frank L. Orr, doing business as Orr Drug Company or Orr Pharmacy. In Equity. Affidavit of R. C. Wrede. Filed Jan. 5, 1917. Wm. M. Van Dyke, clerk; by T. F. Green, deputy. S. J. Parsons, atty for defendants.

*In the District Court of the United States, for the
Southern District of California, Southern Division.*
THE COCA COLA COMPANY,

Complainant,

VERSUS

ROSE ORR and FRANK L. ORR, doing business as
ORR DRUG COMPANY or ORR PHAR-
MACY,

Defendants.

In Equity. No. C 63.

Affidavit of George Carman and Paul Sharp.

State of California, County of Los Angeles,—ss.

George Carman and Paul Sharp, being first duly sworn each for himself and not one for the other, deposes and says: that he resides in Los Angeles, California; that within a few days last past, at the instance of S. J. Parsons, attorney for the defendants herein, that he, with the other party to this affidavit, obtained four samples of Coca Cola from different druggists in the city of Los Angeles, as follows:

Sample No. 1 from Weaver's Pharmacy, Store No. 2, situated at the corner of Vernon and South Park avenues in said city.

Sample No. 2 from the Model Pharmacy, situated at 6230 South Main street in said city of Los Angeles.

Sample No. 3 from Amundson Drug Co., situated at the corner of 61st street and Moneta avenue in said city.

Sample No. 4 from R. W. Lewis, druggist. His store is situated at the corner of 7th street and Central avenue in said city of Los Angeles.

These affiants further say that the said druggists, from whom said samples were obtained, claim to have purchased the said syrup as follows:

That said samples Nos. 1 and 4 are claimed to have been purchased from the Western Wholesale Drug Company in the city of Los Angeles, which company, as these affiants are informed and verily believe, is the distributing agent in said city of Los Angeles for The Coca Cola Company, the plaintiff herein; these affiants say, upon information and belief, that said statement is correct.

These affiants further say that the said samples Nos. 2 and 3 were purchased by said druggists from the Brunswig Drug Company, at 501 South Main street in said city of Los Angeles.

These affiants further say that said samples were thereupon, as these affiants are informed and believe, taken to the following named analytical chemists, namely, samples Nos. 1 and 2, purchased as aforesaid, were taken to Arthur R. Maas, 326 San Pedro street, in the city of Los Angeles for analysis; and said samples Nos. 3 and 4 were taken to Smith, Emery & Co. at 245 South Los Angeles street, in said city for analysis.

These affiants further say, upon information and belief, that said syrups were analyzed by said chemists and reports made thereon at the instance of the attorney for defendants herein, and that the said chemists reported thereon on January 2nd, 1917. That copies of the reports of said chemists are hereto annexed, marked "Defendants' Exhibits 4 and 5" and the same are hereby referred to and made a part hereof.

These affiants further say that there is presented to the court herewith four certain bottles, marked "Sample No. 1"; "Sample No. 2"; "Sample No. 3"; and "Sample No. 4," said syrup in said bottles being taken from the identical bottles which were obtained from the said druggists herein mentioned and corresponding with the said analysis so made by said chemists and marked Nos. 1, 2, 3 and 4 as herein stated, said product having been purchased as herein stated as and for Coca Cola and the analysis of which is presented herewith. That said bottles are also marked "Defend-

ants' Exhibits '6,' '7,' '8' and '9'" for identification.

And further these affiants say not.

GEORGE CARMAN.

PAUL SHARP.

Subscribed and sworn to before me this 3rd day of
January, 1917.

(Seal)

SIDNEY J. PARSONS,

Notary Public in and for the County of Los Angeles,
State of California.

(DEFENDANT'S EXHIBIT "4")

(Letterhead of Arthur R. Maas, analytical and manu-
facturing chemist with headings on the side.)

Los Angeles, Cal., Jan. 2, 1917.

Mr. Sidney J. Parsons,

Los Angeles, Cal.

Dear Sir:

I submit below the results of a chemical analysis of
two samples of Coca Cola, sample No. 1 purchased
from Weaver's Pharmacy, 4400 South Park Ave.,
store number 2; sample No. 2 purchased from the
Model Pharmacy, 6230 So. Main St.

The results of these analyses show that Coca Cola is
not uniform.

Yours very truly,

ARTHUR R. MAAS.

ARM: C

Enc.

ANALYSIS.

Sample #1

Specific gravity.....	1.267@64°F
Phosphoric acid (P2O5).....	.211% by weight
Caffeine181%

Sample #2

Specific gravity.....	1.262@64°%
Phosphoric acid (P2O5).....	.209% by weight
Caffeine194

(DEFT'S EXHIBIT "5")

(Letterhead of Smith, Emery & Company.)

Los Angeles

Date, Jan. 2, 1917.

Laboratory No. 16287-88.

Sample syrups.

Received 12-23-1916. Marked (See below.)

Submitted by Sidnev J. Parsons, attorney, Los Angeles, Cal.

Determinations.

Lab. No.	18287	18288
Mark	#3	#4
Specific gravity ..	1.265	1.214
Caffeine1108%	.0988%
	.64 grains per fluid ounce	.55 grains per fluid ounce
Phosphoric acid (H ₃ PO ₄)	.259%	.237%
	1.43 grains per fluid ounce	1.31 grains per fluid ounce

Respectfully submitted,

(Seal)

SMITH, EMERY & CO.,
Chemists & Chemical Engineers.

[Endorsed]: Original. No. C 63. In the District Court of the United States, Southern District of California. The Coca Cola Company, complainant, versus Rose Orr & Frank L. Orr, doing business as Orr Drug Company or Orr Pharmacy, defendants. In Equity. Affidavit of George Carman and Paul Sharp. Filed Jan. 5, 1917. Wm. M. Van Dyke, clerk; by T. F. Green, deputy clerk. S. J. Parsons, attorney for defendants.

*In the District Court of the United States, for the
Southern District of California, Southern Division.*

THE COCA COLA COMPANY,

Complainant,

VERSUS

ROSE ORR and FRANK ORR, doing business as
ORR DRUG COMPANY or ORR PHAR-
MACY,

Defendants.

In Equity.

Affidavit of Brent Martin.

State of California, County of Los Angeles,—ss.

Brent Martin being first duly sworn says: that he is the identical Brent Martin mentioned in the affidavit of O. N. Normandin and sworn to on the 25th day of November, 1916, and in the Exhibits "A," "B" and "C" annexed thereto.

That this affiant was formerly in the employ of Frank Orr.

This affiant says that never, to his knowledge, did he, while in the employ of the said Orr, or anyone

else, sell either to the said O. N. Normandin or to C. N. Robbins, or to anyone else, Coke, or any other drink or substance as and for Coca Cola. If any such thing ever occurred, which this affiant does not believe, that it was a mere error or mistake. That he never intended so to do and never was instructed so to do, either by Orr or anyone else and that the said Normandin is mistaken in his statements made in regard thereto.

This affiant further says that he was well acquainted with the soda fountain in the drug store of the defendants Rose Orr and Frank Orr situated at the corner of Twelfth street and Maple avenue in the city of Los Angeles. That the carbonated water spigot, through which the drinks drawn from the fountain are carbonated, is in the middle of the fountain; that the first spigot to the right of said water spigot was labeled "Coke" and that the fourth spigot to the left of said carbonated water spigot was labeled "Coca Cola." That this was true during all the time this affiant worked in said store.

That this affiant never knew anyone at said store to sell something else in place of Coca Cola and he does not believe that any such thing occurred at any time and that this affiant most certainly did not.

This affiant further says that he never sold syrup, either Coca Cola, Coke, or any other syrup contained in said fountain to any person to be carried away from the store, but only sold carbonated drinks in the usual way, as is done at said fountains, the same to be drank upon the premises and he never remembers to have filled any thermos bottle for the said Normandin,

or anyone else, except at one time with root beer, and he is confident that he would have remembered the fact had such a strange and unusual request been made of him. That the said Normandin is certainly mistaken in said matter so far, at any rate, as this affiant is concerned and this affiant never knew anyone employed in said store, while he was there, to sell syrup from the fountain to be taken away from the store, nor did he ever hear that such a thing had been done until this fact was called to his attention by the affidavits in this case, except that at one time he sold some root beer to be carried away.

And further affiant saith not.

BRENT MARTIN.

Subscribed and sworn to before me this 28th day of December, 1916.

(Seal)

SIDNEY J. PARSONS,

Notary Public in and for the County of Los Angeles,
State of California.

[Endorsed]: Original. In the District Court of the United States, Southern District of California, Southern Division. The Coca Cola Company, complainant, versus Rose Orr and Frank Orr, doing business as Orr Drug Company or Orr Pharmacy, defendants. In Equity. Affidavit of Brent Martin. Filed Jan. 5, 1917. Wm. M. Van Dyke, clerk; by T. F. Green, deputy clerk. S. J. Parsons, attorney for Frank Orr.

*In the District Court of the United States, for the
Southern District of California, Southern Division.*

THE COCA COLA COMPANY,

Complainant,

vs.

ROSE ORR and FRANK L. ORR, doing business as
ORR DRUG COMPANY or ORR PHAR-
MACY,

Defendants.

Affidavit of Rose Orr.

State of California, County of Los Angeles,—ss.

Rose Orr, being first duly sworn, deposes and says that she is one of the defendants in the above entitled action; that she is the owner and proprietor of Orr's Pharmacy, situated at No. 1200 Maple avenue, in the city of Los Angeles, California, namely at the corner of 12th street and Maple avenue in said city; that she has owned said business since May, 1915, and has done business under the fictitious name of Orr's Pharmacy, being authorized so to do pursuant to law in compliance with the statutes of the state of California.

That she has knowledge of the complaint in this matter and the affidavits therein.

This affiant says that said business has been conducted for her by her agent and manager, Frank L. Orr, her husband; that the said Frank L. Orr is also one of the defendants herein.

This affiant says that she has little or nothing to do with the conduct of said business and is seldom at said store, but that she knows in regard to the facts in this

case from observation and from inquiry of her said manager and agent, Frank L. Orr.

This affiant expressly states that she has never authorized her said agent, Frank L. Orr, or any person in her employ to sell any product at the soda fountain in said store as and for Coca Cola which was not in truth and in fact Coca Cola, and that if any such thing has been done, which this affiant does not believe, it was done without her knowledge or consent.

This affiant says that she is acquainted with the statements made by the said Frank L. Orr in his affidavit herein and is acquainted with the allegations of the answer herein, verified by herself, and that she verily believes, upon information and belief, that all the allegations in said answer and in the said affidavit of said Frank L. Orr are true.

This affiant has no further knowledge as to the matters in dispute herein; and further affiant saith not.

ROSE ORR.

Subscribed and sworn to before me this 30th day of 30th December, 1916.

(Seal)

SIDNEY J. PARSONS,

Notary Public in and for Los Angeles County, State of California.

[Endorsed]: Original. No. C 63. In the District Court of the United States, Southern District of California, Southern Division. The Coca Cola Company, complainant, versus Rose Orr & Frank L. Orr, doing business as Orr Drug Company or Orr Pharmacy. In Equity. Affidavit of Rose Orr. Filed Jan. 5, 1917. Wm. M. Van Dyke, clerk; by T. F. Green, deputy clerk. S. J. Parsons, atty. for defendants.

*In the District Court of the United States for the
Southern District of California, Southern Di-
vision.*

THE COCA COLA COMPANY,

Complainant,

v.

ROSE ORR and FRANK L. ORR, doing business
as ORR DRUG CO., or ORR PHARMACY,
Defendants.

In Equity. No. C 63.

Affidavit of W. B. Pinney.

State of California, County of Los Angeles—ss.

W. B. Pinney, being first duly sworn, deposes and says: That he is and at all times herein mentioned has been employed as chief clerk for the law firm of O'Melveny, Stevens & Millikin, counsel for the complainant herein; that on the 8th day of February, 1917, affiant tendered and offered to S. J. Parsons, Esq., counsel for defendants herein, in the office of said S. J. Parsons, Esq., the sum of two dollars and eighty cents (\$2.80) lawful money of the United States, said sum being the amount of the defendants' clerk's costs herein.

That said S. J. Parsons, Esq., did then and there refuse to accept said sum.

Affiant further states that on the 9th day of February, 1917, he requested said S. J. Parsons, Esq., to tell affiant how much defendants' taxable costs other than said sum of two dollars and eighty cents (\$2.80) hereinabove referred to, amounted to and that said S. J. Parsons, Esq., did then and there refuse to give affiant this information.

W. B. PINNEY.

Subscribed and sworn to before me this 9th day of February, 1917.

(Seal)

NELLIE LEMERT,

Notary Public in and for the County of Los Angeles,
State of California.

[Endorsed]: No. C 63. In the United States District Court, in and for the Southern District of California, Southern Division. The Coca Cola Company, complainant, v. Rose Orr and Frank L. Orr, doing business as Orr Drug Co., or Orr Pharmacy, defendants. Affidavit. Filed Feb. 9, 1917. Wm. M. Van Dyke, clerk; by R. S. Zimmerman, deputy clerk. O'Melveny, Stevens & Millikin, suite 825 Title Insurance Bldg., N. E. corner Fifth & Spring Sts., Los Angeles, Cal., attorneys for complainant.

At a stated term, to-wit, the July term, A. D., 1916, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the court room thereof, in the city of Los Angeles, on Friday, the fifth day of January, in the year of our Lord one thousand nine hundred and sixteen. Present: The Honorable Benjamin F. Bledsoe, district judge.

THE COCA COLA COMPANY,

Complainant,

vs.

ROSE ORR, *et al.*,

Defendants.

In Equity. No. C 63.

Copy of Minute Order.

This cause coming on this day to be heard under and pursuant to the order heretofore made and entered herein that defendants show cause why an injunction *pendente lite* should not be issued herein pursuant to the prayer of the bill of complaint; H. M. Stevens, Esq, appearing as counsel for complainant, Sidney J. Parsons, Esq., appearing as counsel for defendants; and said rule to show cause and application for injunction having been argued, in opposition thereto, by Sidney J. Parsons, Esq., appearing as counsel for defendants; and said rule to show cause and application for injunction having been argued, in opposition thereto, by Sidney J. Parsons, Esq., of counsel for defendants; and defendants having offered certain exhibits, which are admitted in evidence in their behalf, to-wit: Deft. Ex. A, photograph of stand and dispenser, label Frank L. Orr, druggist, 12th street and Maple avenue, Los Angeles; Deft. Ex. B, photograph of same stand and dispenser as that photographed in Deft. Ex. A, with fountain attached, etc.; Deft. Ex. C, bottle, containing fluid from Weaver's Pharmacy Store No. 2, Vernon and Park avenues; Deft. Ex. D, bottle containing fluid from Model Pharmacy, 6230 South Main street; Deft. Ex. E, bottle containing fluid from source not indicated; Deft. Ex. F, bottle containing fluid from Smundson Drug Company, 61st and Moneta avenue; and Deft. Ex. G, bottle containing fluid from R. W. Lewis, druggist, 7th St. and Central avenue; and said rule to show cause and application for injunction having been further argued, in support thereof, by H. M. Stevens, Esq., of counsel

for complainant; it is by the court ordered that complainant's application for an injunction as prayed for be, and the same hereby is denied, without prejudice to its renewal, if complainant shall be so advised, and it is further ordered that the order to show cause and temporary restraining order herein be, and the same hereby is vacated, set aside and dissolved.

[Endorsed]: No. C 63. Equity. United States District Court, Southern District of California, Southern Division. Coca Cola Company, complainant, vs. Rose Orr, *et al.*, defendants. Copy of Minute Order. Filed Feb. 17, 1917. Wm. M. Van Dyke, clerk; by, deputy clerk.

*In the District Court of the United States, for the
Southern District of California, Southern Division.*
THE COCA COLA COMPANY,

Complainant,

VERSUS

ROSE ORR and FRANK L. ORR, doing business as
ORR DRUG CO., or ORR PHARMACY,
Defendants.

In Equity.

**Application for Injunction and Upon Motion to Dismiss
Plaintiff's Bill.**

State of California, County of Los Angeles,—ss.

Sidney J. Parsons, being first duly sworn, deposes and says: that he is the attorney and counsel for the defendants in the above entitled action; that this action is one for an injunction and was begun or filed on the 12th day of December, 1916; that an order to show

cause why a preliminary injunction should not be issued herein was issued therein and said matter was set for hearing on the 18th day of December, 1916; that said motion for preliminary injunction was, by the court, continued to be heard on the 2nd day of January, 1917.

That said matter was taken up at said time before the Hon. Benjamin F. Bledsøe, one of the judges of said court, and the same was heard upon the bill of complaint; the answer of said defendants; and numerous affidavits and exhibits; in connection therewith, and said cause was fully argued on the part of the said plaintiff and submitted to the court; that thereupon and after said hearing the court entered its interlocutory decree, or its decretal order, denying the said plaintiff's motion and application for a preliminary injunction, but permitting the said plaintiff to renew said motion if so advised at any time; and this affiant further says that thereby and by said decretal order or interlocutory decree the said court granted to the said defendants a permissive injunction or right to continue their business without the interference of an injunction as asked for by the said plaintiff.

This affiant further says that thereafter and on the 8th day of January, 1917, the said cause was, by the said plaintiff, through its attorneys, set down for trial in said court for the 16th day of February, 1917, at 10 o'clock a. m. of said day and notice of trial, namely, of said order setting said cause for trial, was served upon the attorney for said defendant on January 23rd, 1917.

That thereupon and immediately after the setting

of the said cause this affiant, on behalf of said defendants, began to prepare for the trial of said cause. That this affiant knows of his own knowledge that the said order and permissive right or injunction to continue the said business of said defendants as theretofore conducted is to said defendants a valuable and important right and that the right to have said cause tried in said court is to said defendants a valuable and important right. That this affiant has been informed by the counsel and attorney for plaintiff that if said cause is dismissed the said plaintiff intends to immediately begin an action in the Superior Court of Los Angeles county against the said defendants upon the same identical cause of action and state of facts herein involved and that the purpose of seeking the dismissal of this case is that the said plaintiff desires to transfer said cause of action into the state court of the state of California and to prosecute the same therein. That this affiant believes that all the facts in said matter were before this court upon the said hearing for preliminary injunction and this affiant says that the learned judge who heard said cause stated to plaintiff's attorney and counsel that if said cause were submitted to him upon the facts appearing from affidavits and exhibits before the court, that the decision would be, and must be, as he, the said judge, viewed the case, in favor of the said defendants.

This affiant hereby refers to the bill of complaint herein; the answer of the defendants and to each and all the affidavits, both of the plaintiff and said defendants herein, together with all exhibits annexed to said affidavits or filed herein and makes the same and

each and all of the same and every part thereof a part of this affidavit as exhibits.

This affiant also refers to all orders, notices of motion and returns thereof and to the entire records in this case, and makes the same and the whole thereof a part of this affidavit as exhibits.

Wherefore, the defendants pray the court that plaintiff's motion to dismiss said cause be denied; or that in case said cause is dismissed that the same be dismissed upon its merits, and said defendants will ever pray.

SIDNEY J. PARSONS.

Subscribed and sworn to before me this 2nd day of February, 1917.

(Seal)

NEIL S. McCARTHY,

Notary Public in and for the County of Los Angeles,
State of California.

[Endorsed]: Original. No. C 63. In the District Court of the United States, for the Southern District of California, Southern Division. The Coca Cola Company, complainant, versus Rose Orr and Frank L. Orr, doing business as Orr Drug Company or Orr Pharmacy, defendants. In Equity. Application for Injunction and Upon Motion to Dismiss Plaintiff's Bill. Copy within rec'd this 5th day of Feb., 1917. Candler, Thompson & Hirsch, O'Melveny, Stevens & Millikin, Walter K. Tuller, solicitors for complainant. Filed Feb. 5, 1917. Wm. M. Van Dyke, clerk; Geo. W. Fenimore, deputy. S. J. Parsons, attorney for defendant.

*In the District Court of the United States, for the
Southern District of California, Southern Division.*

THE COCA COLA COMPANY,

Complainant,

vs.

ROSE ORR and FRANK L. ORR, doing business as
ORR DRUG COMPANY or ORR PHAR-
MACY,

Defendants.

Notice of Motion to Dismiss.

To the Defendants Above Named and Sidney J. Par-
sons, Their Attorney:

You and each of you will please take notice, that on
Monday, the 5th day of February, 1917, at the hour
of ten o'clock a. m., or as soon thereafter as counsel
can be heard, complainant will move the above entitled
court for an order dismissing said cause upon the pay-
ment of the defendants' costs herein, without prejudice
to the bringing of another cause on the same alleged
facts by complainant. Said motion will be made on
the ground that the defendants do not seek any affirma-
tive relief in said cause and that no decree has, up to
the present time, been made or given in said cause.
Said motion will be based on all the records and files
herein, and upon this notice of motion. Dated January
31, 1917.

CANDLER, THOMPSON & HIRSCH,
O'MELVENY, STEVENS & MILLIKIN.
WALTER K. TULLER,

Attorneys for Complainant.

[Endorsed]: Orig. No. C 63. Eq. In the United

States District Court, in and for the Southern District of California, Southern Division. The Coca Cola Company, complainant, vs. Rose Orr and Frank L. Orr, doing business as Orr Drug Company or Orr Pharmacy, defendant. Notice of Motion to Dismiss. Received copy of the within Notice this 31 day of Jan., 1917. S. J. Parsons, attorney for defendant. Filed Jan. 31, 1917. Wm. M. Van Dyke, clerk; by Leslie S. Colyer, deputy clerk. O'Melveny, Stevens & Millikin, suite 825 Title Insurance Bldg., N. E. corner Fifth & Spring Sts., Los Angeles, Cal., attorneys for complainant. G. W. F.

At a stated term, to-wit, the January term, A. D. 1917, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the court room thereof, in the city of Los Angeles, on Monday, the fifth day of February, in the year of our Lord one thousand nine hundred and seventeen. Present: The Honorable Oscar A. Trippet, district judge.

COCA COLA COMPANY,

Complainant,

vs.

ROSE ORR, *et al.*,

Defendants.

Equity. No.C 63.

Copy of Minute Order.

This cause coming on this day to be heard on complainant's motion to dismiss this cause without prejudice; Alexander MacDonald, Esq., appearing on

behalf of Walter K. Tuller, Esq., of counsel for complainant; Sidney J. Parsons, Esq., appearing as counsel for defendants; and this cause having been continued until the hour of 2 o'clock p. m. of this day for said hearing, and having been again called for the same at the hour of 2 o'clock p. m.; and counsel being present as before; and said motion having been argued, on behalf of complainant by Alexander MacDonald, Esq., appearing as aforesaid on behalf of Walter K. Tuller, Esq., of counsel for complainant, and on behalf of defendants by Sidney J. Parsons, Esq., of counsel for defendants; it is ordered that complainant's said motion to dismiss this cause without prejudice be, and the same hereby is granted to which ruling of the court, on motion of defendants and by direction of the court, exceptions are hereby noted herein on behalf of said defendants.

[Endorsed]: No. C 63 Equity. United States District Court, Southern District of California, Southern Division. Coca Cola Company, complainant, vs. Rose Orr, *et al.*, defendants. Copy of Minute Order. Filed Feb. 17, 1917. Wm. M. Van Dyke, clerk; by, deputy clerk.

*In the District Court of the United States, for the
Southern District of California, Southern Division.*

THE COCA COLA COMPANY,

Complainant,

v.

ROSE ORR and FRANK L. ORR, doing business as
ORR DRUG CO. or ORR PHARMACY,

Defendants.

In Equity. No. C 63.

Decree Dismissing Bill Without Prejudice.

Complainant having moved the above entitled court on the 5th day of February, 1917, for an order dismissing said cause upon the payment of defendants' costs herein without prejudice to the bringing of another suit on the same alleged facts by complainant, and said motion having been argued by counsel and the court having granted said motion, and it appearing to the court from the affidavit of W. B. Pinney, filed herein, that a tender and offer of payment of the defendants' clerk's costs herein amounted to the sum of two dollars and eighty cents (\$2.80) has been made to said defendants through their counsel, S. J. Parsons, Esq., and that said S. J. Parsons, Esq., has refused to accept said sum. and it further appearing that said sum of two dollars and eighty cents (\$2.80) has been deposited with the clerk of said court for the use and benefit of said defendants in paying said costs, and it further appearing that such further taxable costs as said defendants may have incurred in said cause have not been ascertained, and the court being fully advised in the premises.

Now, therefore, it is hereby ordered, adjudged and decreed that complainant's bill of complaint herein be and the same is hereby dismissed without prejudice to the bringing of another suit or cause of action by complainant on the same alleged facts, and it is further ordered, adjudged and decreed that defendants do have and recover of complainant their costs herein incurred (excepting the sum of two dollars and eighty cents

(\$2.80) hereinabove referred to) taxed in the sum of \$.....

Dated February 13, 1917.

OSCAR A. TRIPPET,

Judge.

Decree entered and recorded Feb. 13, 1917. Wm. M. Van Dyke, clerk; by Geo. W. Fenimore, deputy.

[Endorsed]: No. C 63. In the United States District Court, in and for the Southern District of California, Southern Division. The Coca Cola Company, complainant, v. Rose Orr and Frank L. Orr, doing business as Orr Drug Co. or Orr Pharmacy, defendants. Decree Dismissing Bill Without Prejudice. Received copy of the within Decree this 9th day of February, 1917. S. J. Parsons, attorney for defendants. Filed Feb. 13, 1917. Wm. M. Van Dyke, clerk; Geo. W. Fenimore, deputy. O'Melveny, Stevens & Millikin, suite 825 Title Insurance Bldg., N. E. corner Fifth & Spring Sts., Los Angeles, Cal., attorneys for complainant.

Whereupon, said bill of complaint and application for injunction, subpoena *ad respondendum*, order to show cause why preliminary injunction should not issue, answer, copy of order of court denying complainant's application for injunction, etc., application for injunction, etc., copy of order sustaining motion to dismiss without prejudice, and said decree of dismissal are hereto annexed; the said decree of dismissal being duly

signed, filed and enrolled pursuant to the practice of said District Court.

Attest, etc.

(Seal)

WM. M. VAN DYKE, Clerk.

By T. F. Green,

Deputy Clerk.

[Endorsed]: No. C 63 Equity. In the District Court of the United States for the Southern District of California, Southern Division. The Coca Cola Co., vs. Rose Orr, *et al.*, etc. J. enrolled papers. Filed Feby. 17, 1917. Wm. M. Van Dyke, clerk; by T. F. Green, deputy clerk. Recorded Eq. Jl. No. 4, page 376.

*In the District Court of the United States, for the
Southern District of California, Southern Division.*
THE COCA COLA COMPANY,

Complainant,

VERSUS

ROSE ORR and FRANK L. ORR, doing business as
ORR DRUG CO. or ORR PHARMACY,

Defendants.

In Equity.

Petition on Appeal.

The above named defendants, conceiving themselves aggrieved by the decree made and entered on the day of February, 1917, in the above entitled cause, dismissing the said cause without prejudice, do hereby appeal from said order and decree to the United States Circuit Court of Appeals of the Ninth Circuit, for the reasons specified in the assignment of errors,

which is filed herein, and said defendants pray that this appeal may be allowed, and that a transcript of record, proceedings and papers upon which said order was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

S. J. PARSONS,
Attorney for Defendants.

Dated 14th day of February, 1917.

[Endorsed]: No. C 63. In the District Court of the United States, for the Southern District of California, Southern Division. The Coca Cola Company, complainant, versus Rose Orr and Frank L. Orr, doing business as Orr Drug Company or Orr Pharmacy, defendants. In Equity. Petition on Appeal. Filed Feb. 14, 1917. Wm. M. Van Dyke, clerk; by R. S. Zimmerman, deputy clerk. S. J. Parsons, attorney for defendants.

*In the District Court of the United States, for the
Southern District of California, Southern Division.*

THE COCA COLA COMPANY,

Complainant,

VERSUS

ROSE ORR and FRANK L. ORR, doing business as
ORR DRUG CO. or ORR PHARMACY,

Defendant.

In Equity.

Assignment of Errors.

Now on this 14th day of February, 1917, came the defendants by their counsel and solicitor, Sidney J. Parsons, and show that the order made and entered

in the above entitled cause on the 5th day of February, 1917, granting the motion to dismiss plaintiff's bill of complaint, and the decree entered in said cause on the 13th day of February, 1917, by which it was ordered, adjudged and decreed that the said bill of complaint be dismissed, and each of the same, are erroneous and unjust to said defendants and each of them upon the following grounds:

First. That it appears by the said plaintiff's bill of complaint that this court has jurisdiction in said matter, and the said plaintiff and complainant so alleges; that said bill of complaint was one for injunction for unfair trade or the infringement of a copyright by user, which copyright the defendants were charged with having infringed by selling something else as and for "Coca Cola."

Second. That the said plaintiff and complainant came into court and asked for a preliminary injunction and filed affidavits and exhibits in support of its motion, and thereby put the said defendants to great cost and expense in preparing their defense herein, and that the said plaintiff and complainant thereby selected their forum, the said plaintiff being a non resident of the state of California, and the defendants residing in said state.

Third. That said matter was fully heard before this court and said preliminary injunction was denied; that thereafter the said plaintiff and complainant, through its attorneys and solicitors, set said cause for trial for February 16, 1917; that thereupon the defendants began the preparation for said trial and were put to still further cost and expense in said matter.

Fourth. That by said proceeding and trial of said motion for preliminary injunction, and the setting of the said cause for trial, the said court in part determined said cause and made therein a decretal order sustaining the right of the said defendants to continue their business as theretofore conducted until the further order of said court, or the final determination of said cause, and that the said defendants thereby acquired the right to have said matter so continued and to have said matter finally determined in said court without being subjected to litigation in some other or different court as threatened by the said plaintiff.

Fifth. That the said plaintiff had no right, after thus proceeding in said cause, to have said cause dismissed and to harrass said defendants by an action or actions brought in the courts of the state of California; that said proceedings were taken by said plaintiff and complainant as a trifling with the court, and unjust and inequitable, and contrary to the law and the rules of equity, and repugnant to the dictates of justice, and that the order of said court dismissing said cause is contrary to law, unjust and inequitable, and that the decree entered in pursuance of said order dismissing said cause is against law, unjust and inequitable, and that the said defendants should have been allowed to have said matter heard in the forum selected by the plaintiff, and that the said order and decree in pursuance thereof, dismissing said cause, should be reversed, and that said court should retain jurisdiction of said cause, to prevent a multiplicity of suits and to do full justice between said parties.

Wherefore the defendants pray that said order and

decree be reversed and the said District Court of the United States for the Southern District of California, Southern Division, be directed to set aside the said decree and order of dismissal and to reinstate the said cause, and that the same be tried; or that said cause be reversed and the said District Court be instructed to enter a decree dismissing the said cause on its merits, or that the Circuit Court of Appeals shall reverse the said cause and render a proper decree upon the record, and said defendants and their solicitors will ever pray.

S. J. PARSONS,
Solicitor.

Dated Los Angeles, Cal., February 14th, 1917.

[Endorsed]: No. C 63. In the District Court of the United States, for the Southern District of California, Southern Division. The Coca Cola Company, complainant, versus Rose Orr, and Frank L. Orr, doing business as Orr Drug Company or Orr Pharmacy, defendants. In Equity. Assignment or Errors. Filed Feb. 14, 1917. Wm. M. Van Dyke, clerk; by R. S. Zimmerman, deputy clerk. S. J. Parsons, attorney for defendants.

*In the District Court of the United States, for the
Southern District of California, Southern Division.*
THE COCA COLA COMPANY,

Complainant,

VERSUS

ROSE ORR and FRANK L. ORR, doing business as
ORR DRUG CO. or ORR PHARMACY,

Defendants.

In Equity.

Order Allowing Appeal and Fixing Amount of Bond.

It is hereby ordered that the petition of the defendants asking that they be allowed to appeal herein to the United States Circuit Court of Appeals of the Ninth Circuit, be and the same is hereby granted upon the said defendants giving bond in the sum of \$250.00 to the effect that if the said defendants in error shall prosecute said appeal with effect and answer all damages and costs if they fail to make their said appeal good, then the said obligation to be void, otherwise to remain in full force and effect; the said bond to be approved by the clerk of this court.

Dated this 14 day of February, 1917.

OSCAR A. TRIPPET,

Judge.

[Endorsed]: No. C 63. In the District Court of the United States, for the Southern District of California, Southern Division. The Coca Cola Company, complainant, versus Rose Orr and Frank L. Orr, doing business as Orr Drug Company or Orr Pharmacy. In Equity. Order Allowing Appeal and Fixing Amount of Bond. Filed Feb. 14, 1917. Wm. M. Van Dyke, clerk; by R. S. Zimmerman, deputy clerk. S. J. Parsons, attorney for defendants. Eq. OB 239.

*In the District Court of the United States, for the
Southern District of California, Southern Division.*
THE COCA COLA COMPANY,

Complainant,

vs.

ROSE ORR and FRANK L. ORR, doing business as
ORR DRUG CO. or ORR PHARMACY,

Defendants.

In Equity.

Bond on Appeal.

Know all men by these presents, that the United States Fidelity & Guaranty Company, a corporation existing under and by virtue of the laws of the state of Maryland, and duly licensed to transact business in the state of California, is held and firmly bound unto The Coca Cola Company, complainant in the above entitled cause, in the penal sum of two hundred fifty and no/100 dollars (\$250.00), to be paid to The Coca Cola Company, its successors and assigns and legal representatives, for which payment well and truly to be made, the United States Fidelity & Guaranty Company binds itself, its successors and assigns firmly by these presents.

The condition of the above obligation is such, that whereas, Rose Orr and Frank L. Orr, doing business as Orr Drug Co. or Orr Pharmacy, defendants in the above entitled suit, are about to take an appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the order made on February 5th, 1917, and the decree made, rendered and entered on the 13th day of February, 1917, by the United States District Court, for the Southern District of California, Southern Division, in the above entitled cause.

Now therefore, if the above named appellants shall prosecute said appeal to effect, and answer all costs which may be adjudged against them, if they fail to make good their appeal, then this obligation shall be void, otherwise to remain in full force and effect.

Dated at Los Angeles, California, this 14th day of February, 1917.

UNITED STATES FIDELITY & GUARANTY
COMPANY,

(Seal)

By Frank M. Kelsey,
Its Attorney in Fact.

Approved 2/14/17.

TRIPPET, Judge.

State of California, County of Los Angeles,—ss.

On this 14th day of February, in the year one thousand nine hundred and seventeen, before me, Hallie D. Winebrenner, a notary public in and for said county and state, residing therein, duly commissioned and sworn, personally appeared Frank M. Kelsey, known to me to be the duly authorized attorney in fact of the United States Fidelity and Guaranty Company, and the same person whose name is subscribed to the within instrument as the attorney in fact of said company, and the said Frank M. Kelsey duly acknowledged to me that he subscribed the name of the United States Fidelity and Guaranty Company thereto as principal and his own name as attorney in fact.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

(Seal) HALLIE D. WINEBRENNER,

Notary Public in and for Los Angeles County, State of California.

[Endorsed]: No. C 63. In the District Court of the United States, Southern District of California, Southern Division. The Coca Cola Company, complainant, vs. Rose Orr, *et al.*, defendants Bond on Appeal.

Filed Feb. 14, 1917. Wm. M. Van Dyke, clerk; by R. S. Zimmerman, deputy clerk. United States Fidelity and Guaranty Company, Frank M. Kelsey, general agent, 700-703 Hibernian Building, Los Angeles, Cal.

*In the District Court of the United States, for the
Southern District of California, Southern Division.*
THE COCA COLA COMPANY,

Complainant,

VERSUS

ROSE ORR and FRANK L. ORR, doing business as
ORR DRUG CO. or ORR PHARMACY,
Defendants.

In Equity.

Praeceptum for Transcript of Record.

To the Clerk of Said Court:

Sir: Please issue and prepare for the transcript on appeal to the Circuit Court of Appeals, the bill of complaint, answer, the copy of the minute order denying the preliminary injunction, together with all affidavits used thereon, both by the plaintiff and the defendant, a copy of the notice of motion to dismiss said action, together with the affidavit on the part of the defendants in resisting the same and the copy of the minute order, or other order, dismissing said case, and a copy of the final decree dismissing said case, also the petition for order allowing appeal, assignment of errors, order allowing appeal and fixing bond, bond on appeal, citation on appeal, and such other and further documents relating to the said cause on file, and that the same be sent up to the Circuit Court of

Appeals, and that the same may be printed as the defendants' transcript.

Los Angeles, Cal., February 14th, 1917.

S. J. PARSONS,
Attorney for Defendants.

*In the District Court of the United States, for the
Southern District of California, Southern Division.*
THE COCA COLA COMPANY,

Complainant,

VERSUS

ROSE ORR and FRANK L. ORR, doing business as
ORR DRUG CO. or ORR PHARMACY,
Defendants.

In Equity.

AFFIDAVIT OF SERVICE.

State of California, County of Los Angeles,—ss.

Sidney J. Parsons, being first duly sworn, deposes and says: that he is counsel and attorney for the defendants in the above entitled action; that on the 14th day of February, 1917, at 2:30 o'clock p. m. of said day he served the praecipe in the above entitled action upon the solicitors and attorneys for the plaintiff, by delivering to and leaving the same with Messrs. O'Melveny, Stevens and Millikin, at their office, 811 to 826 Title Insurance Building, corner of Fifth & Spring streets in the city of Los Angeles, California, in the manner following, to-wit, that a true copy of said praecipe was left with their stenographer, a person of legal age, in the presence of one of their clerks, Mr. MacDonald and Mr. Stevens being absent from the office at the time; that thereafter Henry Stevens, Esq., called

this affiant on the telephone and stated that he preferred to have Mr. Macdonald attend to the matter. That this affiant was unable to find Mr. Macdonald, but that said papers were left with the solicitors and attorneys for said plaintiff and this affidavit is made accordingly.

Further this affiant sayeth not.

SIDNEY J. PARSONS.

Subscribed and sworn to before me this 14th day of February, 1917.

(Seal)

NEIL S. McCARTHY,

Notary Public in and for the County of Los Angeles,
State of California.

[Endorsed]: Original. No. C 63. In the District Court of the United States, for the Southern District of California, Southern Division. The Coca Cola Company, complainant, versus Rose Orr and Frank L. Orr, doing business as Orr Drug Company or Orr Pharmacy, defendants. In Equity. Praeceptum For Transcript of Record. Filed Feb. 14, 1917. Wm. M. Van Dyke, clerk; by Chas. N. Williams, deputy clerk. S. J. Parsons, attorney for defendants.

*In the District Court of the United States, for the
Southern District of California, Southern Division.*
THE COCA COLA COMPANY,

Complainant,

v.

ROSE ORR and FRANK L. ORR, doing business as
ORR DRUG COMPANY or ORR PHAR-
MACY,

Defendants.

In Equity. No. C 63.

Praeipie of Complainant for Additions to Transcript.

To the Clerk of Said Court:

Sir: Please issue and prepare and insert in the transcript heretofore ordered and requested by the defendants herein the following:

1. The affidavit of W. B. Pinney, filed herein on February 9, 1917.

CANDLER, THOMSON & HIRSCH,
O'MELVENEY, STEVENS & MILLIKIN,
WALTER K. TULLER,

Solocitors for Complainant.

[Endorsed]: Original. No. C 63. In the United States District Court, in and for the Southern District of California, Southern Division. The Coca Cola Company, complainant, v. Rose Orr and Frank L. Orr, doing business as Orr Drug Company or Orr Pharmacy. Praeipie of Complainant for Additions to Transcript. Received copy of the within Praeipie this 19 day of Febry., 1917. S. J. Parsons, attorney for defendants. Filed Feb. 19, 1917. Wm. M. Van Dyke, clerk; by Leslie S. Colyer, deputy clerk. O'Melveney, Stevens & Millikin, suite 825 Title Insurance Bldg., N. E. corner Fifth & Spring Sts., Los Angeles, Cal., attorneys for complainant.

United States
Circuit Court of Appeals,
FOR THE NINTH CIRCUIT.

The Coca Cola Company,

Appellee,

vs.

Rose Orr and Frank L. Orr,
Doing Business as Orr Drug
Co., or Orr Pharmacy,

Appellants.

APPELLANTS' OPENING BRIEF.

S. J. PARSONS,

Trust & Sav. Bldg., 6th & Spring, Los Angeles,
Attorney for Appellants.

O'MELVENY, STEVENS & MILLIKIN and

WALTER K. TULLER,

Title Ins. Bldg., 5th & Spring Sts., Los Angeles.

CANDLER, THOMSON & HIRSCH,

Candler Building, Atlanta, Georgia

Attorneys for Appellee.

Filed

SEP 1 1917

United States
Circuit Court of Appeals,
FOR THE NINTH CIRCUIT.

The Coca Cola Company,		
	vs.	
Rose Orr and Frank L. Orr, Doing Business as Orr Drug Co., or Orr Pharmacy,		
		<i>Appellants.</i>

APPELLANTS' OPENING BRIEF.

STATEMENT OF FACTS.

May It Please Your Honors:

This is an appeal, by the defendants, from an order and decree dismissing the action, without prejudice, upon motion of the plaintiff over the objection of defendants.

The action as shown in the Bill of Complaint [see Tr. pages 5 to 10] is an action in equity for an injunction and accounting for profits, commonly referred to by lawyers as an action for "unfair trade"; that is to say, the plaintiff pleads a trademark by

user in the name of a beverage known as "Coca Cola" and alleges that the defendants—who are druggists—have infringed its rights by selling something other than "Coca Cola" as such.

The plaintiff sets up in its Bill of Complaint that it is a corporation existing under the laws of the state of Georgia; that the defendants are druggists in the city of Los Angeles, California. The complaint then alleges: "That the jurisdiction of this court arises by reason of the diversity of citizenship of the parties hereto, and in that the matter here in dispute exceeds the sum or value of \$3,000, exclusive of interest and costs." It alleges that the plaintiff has been since 1892 the manufacturer of a beverage known as "Coca Cola," and that it had established a large and valuable trade therefor in the city of Los Angeles; that the beverage was made in the form of a syrup and mixed with carbonated water, and in that form sold at soda fountains or in bottles to consumers. It alleges that it had expended large sums of money in advertising this beverage and that it was sold throughout the United States and universally known to the trade by this name. It then states that the syrup is colored with caramel and has a distinctive color. It alleges that it has the sole and exclusive right to use this name.

In the sixth paragraph of the complaint the allegation is made that the defendants at their place of business in Los Angeles have maintained an unfair competition with the plaintiff, and that the defendants have delivered and sold, and were so doing at the

time of the beginning of the action, a spurious beverage, the color whereof is in simulation of the plaintiff's as and for the carbonated drink made from plaintiff's "Coca Cola" syrup; that the defendants have thus diverted profits from the plaintiff; and alleges that the plaintiff was without adequate remedy at law.

The bill prayed for an injunction against the defendants, their agents, clerks, etc., from selling any beverage other than Coca Cola as such; from marketing a product of similar color. The prayer also asks for accounting of profits and damages.

The action was begun by filing of this bill on or about December 11, 1916. [Tr. page 11.] On this latter date an order to show cause why a preliminary injunction should not issue was granted. [Tr. pages 14-15.] The preliminary motion for an injunction was made upon the Bill of Complaint and ten affidavits [see Tr. Index and Tr. pages 25 to 64].

The defendants answered, denying specifically all material allegations of the bill, and particularly denying that they had ever in any way or manner infringed the rights of the plaintiff in its trademark by selling any other beverage, whether inferior or otherwise, as and for "Coca Cola."

The answer of the defendants was supported upon the motion by certain affidavits and exhibits, as shown by the record [see Tr. pages 64 and 85].

The motion was argued before Hon. Benjamin F. Bledsoe on January 2nd, 1917, and thereupon an order was made denying the application for an injunction *pendente lite*, the order being dated February

17, 1917. [Tr. pages 86-87.] On January 8th, 1917, the plaintiff caused the action to be set for trial and the same was set down for trial for the 16th day of February, 1917. [Tr. page 88.] On January 31st, 1917, the plaintiff served and filed a notice and motion to dismiss the action, "without prejudice to the bringing of another cause of action on the same alleged facts by complainant." [Tr. page 91.] This motion was resisted by the defendants, their attorney filing an affidavit in objection to the motion [see Tr. pages 87-90] and arguing the matter. The motion was heard before the Hon. Oscar A. Trippet on February 5th, 1917, and an order entered on February 17th, 1917, dismissing the cause without prejudice [Tr. pages 92-93]. On February 13th, 1917, a decree dismissing the bill without prejudice was filed and entered of record. [Tr. pages 94-95.]

The petition for appeal was dated February 14th, 1917, and appears in the Transcript, pages 96-97, and the order allowing the appeal appears in Transcript on page 101. The assignment of errors appears in the Transcript on pages 97-100.

Resisting the motion to dismiss, the defendant claimed that the injunction having been denied in effect permitted them to continue business until the action was tried, the action having been set down for trial by the plaintiff.

The affidavit of plaintiff's attorney stated among other things as follows [Tr. pages 87-89]:

"This affiant further says that thereafter and on the 8th day of January, 1917, the said cause was, by

the said plaintiff, through its attorneys, set down for trial in said court for the 16th day of February, 1917, at 10 o'clock a. m. of said day, and notice of trial, namely, of said order setting said cause for trial, was served upon the attorney for said defendants on January 23rd, 1917."

Further on the affidavit says:

"That this affiant has been informed by the counsel and attorney for plaintiff that if said cause is dismissed the said plaintiff intends to immediately begin an action in the Superior Court of Los Angeles county against the said defendants upon the same identical cause of action and state of facts herein involved, and that the purpose of seeking the dismissal of this case is that the said plaintiff desires to transfer said cause of action into the state court of the state of California and to prosecute the same therein."

The order of dismissal, after the usual recitations, is as follows:

"It is ordered that complainant's said motion to dismiss this cause without prejudice be and the same hereby is granted, to which ruling of the court, on motion of defendants and by direction of the court, exceptions are hereby noted herein on behalf of said defendants." [Tr. page 93.]

The decree [Tr. page 94] reads in part as follows: "Complainant having moved the above-entitled court on the 5th day of February, 1917, for an order dismissing said cause upon the payment of defendants' costs herein without prejudice to the bringing of

another suit on the same alleged facts by complainant, and said motion having been argued by counsel, and the court having granted said motion * * *

Now, therefore, it is hereby ordered, adjudged and decreed that complainant's bill of complaint herein be and the same is hereby dismissed without prejudice to the bringing of another suit or cause of action by complainant on the same alleged facts, and it is further ordered, adjudged and decreed that defendants do have and recover of complainant their costs herein incurred."

The defendants contend that the action should either have been dismissed upon its merits or a dismissal should have been denied and the cause tried.

The defendants' assignments of error follow:

Assignment of Errors.

The defendants by their counsel and solicitor, Sidney J. Parsons, now show that the order made and entered in the above-entitled cause on the 5th day of February, 1917, granting the motion to dismiss plaintiff's bill of complaint, and the decree entered in said cause on the 13th day of February, 1917, by which it was ordered, adjudged and decreed that the said bill of complaint be dismissed, and each of the same, are erroneous and unjust to said defendants and each of them upon the following grounds:

First. That it appears by the said plaintiff's bill of complaint that this court has jurisdiction in said matter, and the said plaintiff and complainant so

alleges; that said bill of complaint was one for injunction for unfair trade or the infringement of a trademark by user, which trademark the defendants were charged with having infringed by selling something else as and for "Coca Cola."

Second. That the said plaintiff and complainant came into court and asked for a preliminary injunction and filed affidavits and exhibits in support of its motion, and thereby put the said defendants to great cost and expense in preparing their defense herein. and that the said plaintiff and complainant thereby selected their forum, the said plaintiff being a nonresident of the state of California, and the defendants residing in said state.

Third. That said matter was fully heard before this court and said preliminary injunction was denied; that thereafter the said plaintiff and complainant, through its attorneys and solicitors, set said cause for trial for February 16, 1917; that thereupon the defendants began the preparation for said trial and were put to still further cost and expense in said matter.

Fourth. That by said proceeding and trial of said motion for preliminary injunction, and the setting of the said cause for trial, the said court in part determined said cause and made therein a decretal order sustaining the right of the said defendants to continue their business as theretofore conducted until the further order of said court, or the final determination of said cause, and that the said defendants thereby acquired the right to have said matter so continued and

to have said matter finally determined in said court without being subjected to litigation in some other or different court as threatened by the said plaintiff.

Fifth. That the said plaintiff had no right, after thus proceeding in said cause, to have said cause dismissed and to harrass said defendants by an action or actions brought in the courts of the state of California; that said proceedings now taken by said plaintiff and complainant is a trifling with the court, and unjust and inequitable, and contrary to the law and the rules of equity, and repugnant to the dictates of justice; and that the order of said court dismissing said cause is contrary to law, unjust and inequitable; and that the decree entered in pursuance of said order dismissing said cause is against law, unjust and inequitable; and that the said defendants should have been allowed to have said matter heard in the forum selected by the plaintiff, and that the said order and decree in pursuance thereof, dismissing said cause, should be reversed, and that said court should retain jurisdiction of said cause, to prevent a multiplicity of suits and to do full justice between said parties.

Wherefore the defendants pray that said order and decree be reversed and the said District Court of the United States for the Southern District of California, Southern Division, be directed to set aside the said decree and order of dismissal and to reinstate the said cause, and that the same be tried; or that said cause be reversed and the said District Court be instructed to enter a decree dismissing the said cause on its merits, or that the Circuit Court of Appeals shall

reverse the said cause and render a proper decree upon the record, and said defendants and their solicitor will ever pray. [See Tr. pages 97-100.]

LAW POINTS.

1.

An Appeal Lies From an Order and Decree Allowing or Denying a Motion to Dismiss the Plaintiff's Bill.

Bush Electric Company v. California Electric Light Co., 51 Fed. Rep. 567 (S. C. 52 Fed. 945).

2.

To Justify an Injunction in a Case of Alleged Unfair Competition, Such as This, the Plaintiff's Case Must Be Clear in All Respects. The Plaintiff, Upon the Record, the Bill, Affidavit and Exhibits, Was Met at Each Point by the Defendants' Answer, Affidavits and Exhibits. The Plaintiff Utterly Failed to Make Out a Case and the Order Denying an Injunction Was Properly Entered.

Hanover Mill Co. v. Metcalf, 240 U. S. 403 (1915) (special attention is called to pages 412 to 414);

Postal Tel. Cable Co. v. Netter, 102 Fed. Rep., p. 691;

N. Y. Asbestos Mfg. Co. v. Ambler Asbestos Air Cell Covering Co., 102 Fed. 890;

C. O. Burns v. W. F. Burns Co., 118 Fed. 944;

Coca Cola Co. v. Branahan, 216 Fed. 264.

3.

A Dismissal by an Order as of Course Is Not Known in the Federal Practice. The Plaintiff Cannot Dismiss Without a Motion and Notice, and an Order of Court.

Electrical Accumulator Co. v. Brush Electric Co., 44 Fed. 604;
Gregory v. Pike, 67 Fed. 837;
Electric Accumulator Co. v. Brush Electric Co., 44 Fed. 602.

4.

The Plaintiff Will Not Be Allowed to Dismiss if in the Light of the Proceedings the Defendant Is Reasonably Entitled to a Decree, and Upon the Record the Defendants Were So Entitled, We Claim.

Chicago and A. R. Co. v. United Rolling Mill Co., 109 U. S. 713-716;
Hershberger v. Blewett, 55 Fed. 170;
Pullman Palace Car Co. v. Central Transf. Co., 171 U. S. 146;
Hat-Sweat Mfg. Co. v. Waring, 46 Fed. 87;
Bank v. Rose, 1 Rich Eq. 292;
Electric Accumulator Co. v. Brush Electric Co., 44 Fed. 602.

5.

“Decree” and “Decretal Order” Defined.

(a) In Bissell Carpet-Sweeper Co. v. Goshen Sweeper Co., 72 Fed. Rep. 554, the court says:

“It is proper, therefore, to assume that when Congress undertook to enlarge the right of appeal it did so in the full light of the history of appeals in equity causes, and with a full appreciation of the distinction between interlocutory orders or decrees and final decrees. What the Congress meant by an interlocutory decree, granting or continuing an injunction, is to be ascertained by interpreting the technical terms used in the act according to their usual significance in courts proceeding according to the well-known principles, rules and usages of courts of equity. Thus, an appeal is allowed from an interlocutory ‘order’ or ‘decree.’ *A preliminary order, by which no question is determined upon the merits, and no right established, is termed a ‘decretal order,’ in distinction to an interlocutory decree, by which something touching the merits is adjudged.* Such an order was seldom regarded as subject to appeal. 2 Daniell, Ch. Pl. & Prac. (Orig. Ed.) 637. *The author just cited, at page 631, defines a decree as ‘a sentence, or order of the court, pronounced on hearing and understanding all the points in issue, and determining the right of all the parties to the suit according to equity and good conscience.’ ‘It is either interlocutory or final. An interlocutory decree is where the consideration of the particular question to be determined, or the further consideration of the cause generally, is reserved till a future hearing.’* Daniell, Ch. Pl. & Prac. (4th Ed.) 986.”

(b) Mr. Simkins, in the 3rd Edition of his work upon “A Federal Equity Suit,” appears to treat a

“decretal order” as the same as an interlocutory decree.

(See Simkins, page 470 *et seq.*)

And he appears to do the same in his definition of a decree.

(See Simkins, page 581 *et seq.*)

(c) In Cyc., Vol. 16, page 471, the author says:

“An order made upon motion or petition for the furtherance of the suit, without settling any right or liability pertaining to the substance of the controversy, is properly a decretal order rather than a decree.”

Citing

Haines v. Haines, 35 Mich. 138;
2nd Daniell Ch. Pr. 637.

6.

**After a Decree or a Decretal Order, the Court Will
Not Allow a Plaintiff to Dismiss His Own Bill,
Unless Upon Consent of the Defendant.**

Foster's Fed. Prac., Vol. II, Sec. 291;
Daniell Ch. Prac. (5 Am. Ed.), page 793;
Cooper v. Lewis, 2 Phillips Ch. 181;
C. & A. R. R. Co. v. Union R. Mill Co., 109
U. S. 703;
Bank v. Rose, 1 Rich. Eq. (S. C.) 294;
Wall v. Crawford, 11 Paige 472;
Pullman Palace Car Co. v. Central Transfer
Co., 49 Fed. 262;
Am. Bell Tel. Co. v. Western Union Tel. Co.,
69 Fed. 670.

See also *Guilbert v. Hawles*, 1 Ch. Cas. 40; *Bluck v. Colnaghi*, 9 Sim. Ch. 411; *Lashley v. Hogg*, 11 Ves. Jr. 602; *Booth v. Leycaster*, 1 Keen's Ch. 255; *Biscoe v. Brett*, 2 Vesey & B. 377; *Collins v. Greaves*, 5 Hare 596; *Gregory v. Spencer*, 11 Beav. 143; *Carrington v. Holly*, 1 Dick. 280; *Anon.*, 11 Ves. Jr. 169; *Cozzens v. Sisson*, 5 R. I. 489; *Opdyke v. Doyle*, 7 R. I. 461; *The Atlas Bank v. The Nahant Bank*, 23 Pick. 491; *Bethia v. M'Kay*, Cheve's Eq. (S. C.) 96; *Sayer's Appeal*, 79 Penn. St.; *Seymour v. Jerome*, Walk. Mich. Ch. 356.

7.

Where Evidence Has Been Taken or a Cause Has Been Set Down for Hearing, or the Cause Been Referred to a Master, a Dismissal Will Be Granted Only by a Decree Dismissing the Bill Upon Its Merits.

Rumbly v. Stainton, 24 Ala. 712;
Rochester v. Lee, 1 Macn. & G. 767;
Stevens v. The Railroads, 4 Fed. 97;
Hat-Sweat Mfg. Co. v. Waring, 46 Fed. 87;
Am. Bell Tel. Co. v. Western Union Tel. Co.,
69 Fed. 670.

ARGUMENT.

The writer has tried to follow the rules of this court in stating as succinctly as possible the facts in this case, following the same with a brief of the law points involved and copying the assignment of errors which appears in the transcript.

He trusts that these parts of his brief make any extended argument unnecessary; that in fact they form an argument which shows the right of the defendants and appellants to the reversal of the order and decree dismissing the plaintiff's case.

The bill of complaint charged the defendants with a fraud, viz., charged that the defendants had sold a different and inferior article to the public in the place and stead of a certain article or beverage made by the plaintiff and sold under the name of "Coca Cola." The affidavits on the part of the complainant were to the effect that a certain number of drinks of "Coca Cola" had been ordered at the soda fountain of defendants by persons acting for the complainant, and that these parties had been supplied from a certain spigot, designating the same as the fourth spigot left of the carbonated water spigot, labeled "Coke." [See Tr. page 51.]

The defendants showed by affidavit [Tr. pages 64-72] and by photographs of their soda fountain, that the fourth spigot to the left of the carbonated water spigot of their soda fountain was in fact labeled "Coca Cola" and not "Coke," although there was a spigot on the right side of the carbonated water spigot which was labeled "Coke." They also stated in their affidavits and answer that they had never sold to any person "Coke" or any other drink as and for "Coca Cola." Upon the showing made the court denied the preliminary injunction. The motion was made before Judge Bledsoe.

The plaintiff then set the case for trial. Thereafter, as shown by the record, the plaintiff moved the court

before Judge Trippett to be allowed to dismiss the case. The motion was resisted by the defendants, and the writer, being the attorney for defendants, supported this objection with an affidavit. [Tr. pages 87-90.]

In denying the motion for a preliminary injunction, Judge Bledsoe gave his reasons, to some extent at any rate. The substance of what he said is set out in the writer's affidavit in the record. [Tr. page 89.] The statement in the affidavit reads: "This affiant believes that all the facts in said matter were before this court upon the said hearing for preliminary injunction, and this affiant says that the learned judge who heard said cause stated to plaintiff's attorney and counsel that if said cause were submitted to him upon the facts appearing from the affidavits and exhibits before the court, that the decision would be, and must be, as he, the said judge, viewed the case, in favor of said defendants."

The answer fully denied all the allegations of the bill and the affidavits met and denied all allegations of fraud or of unfair trade in the affidavits. Upon the record as printed, we believe that it is perfectly clear and plain that the defendants have entitled themselves to a decree in their favor.

Thereafter the plaintiff caused the case to be set down for trial and it was so set down.

This, as the defendants claim, gave them the right to proceed with their business without interference by injunction until the case was tried or another motion made, and gave them the right to have the matter fully heard and determined at an early date in the tribunal which had been selected by the plaintiff, and which

tribunal the plaintiff stated in its bill had jurisdiction of the parties and the subject matter of the controversy. We insist that under the law, after these decretal orders, the court had no right to dismiss this case except upon the merits, unless such dismissal was consented to by the defendants. In this case defendants strenuously objected and still object to a dismissal of the case.

(Plaintiff's attorneys had asked defendants' attorney for a stipulation consenting to the dismissal of the cause and frankly stated that they intended immediately to bring an action on the same identical state of facts in the state court. While it is not a part of the record, the writer thinks it will not be disputed by plaintiff's counsel that such action has already been begun in the state court, and the defendants have pled the pendency of this action in the state court as a matter in abatement.)

(1) We do not suppose it will be contended for a moment that from an order and decree of this kind—viz., dismissing the plaintiff's case, as was here done—that an appeal lies. The writer has not found any case disputing this point. Very many of the cases cited in our brief were appeals either from an order and decree of dismissal or from an order refusing to dismiss.

(2) An order dismissing the case, except upon motion, is never granted in the federal practice.

(3) The cases are clear upon the proposition that an injunction in cases of this kind, viz., unfair competition,

are never granted, unless the plaintiff's rights are very clear. Here the plaintiff failed utterly to make out a case as the record stood at the time of the dismissal. We refer to points 1, 2 and 3 of our brief for our authorities upon the above propositions.

(4) The cases hold that the plaintiff will not be allowed to dismiss if in the light of the proceedings the defendant is reasonably entitled to a decree. We insist that upon the record in this case the defendants were so entitled. For this proposition we refer to the cases cited in the fourth point in our brief, as well as to the cases that follow in this argument.

(5) The fifth point in our brief is a definition of the terms "decree" and "decretal order." A "decretal order" is an order by which no question is determined upon the merits, and no right established pertaining to the substance of the controversy. See cases cited in the brief and also found in this argument.

(6) The sixth point in our brief is this: "After a decree or decretal order, the court will not allow plaintiff to dismiss his own bill, unless upon the consent of the defendant." We have cited numerous authorities under the sixth point in our brief. We claim that the order denying an injunction, as well as the order setting the cause for trial were each decretal orders. *We claim that the record shows upon its face that as the cause stood, the defendants were entitled to a decree dismissing the cause upon its merits, and that under these circumstances an order and decree dismissing the action was erroneous against law, and clearly prejudicial to the defendants.*

We beg to be allowed to refer at some length to certain authorities in support of our contentions, setting out excerpts both from text writers and adjudged cases.

(a) We refer to *Hershberger v. Blewett*, 55 Fed. 170. In this case an action was begun involving the title to real estate; a demurrer to the bill had been sustained and an amended bill filed. The defendants then answered and exceptions to and answer had been submitted to the court and overruled. Some three months thereafter the complainants filed a motion to dismiss without prejudice on payment of costs. No evidence had been taken and no application made to the court to enlarge time for taking evidence. The defendants opposed the motion, claiming that the dismissal of the action would seriously injure them. *The decision denying the motion is by Judge Hanford. Among other things, it is said: "By the court's decisions of the questions which had been argued and decretal orders, the claims and rights of the parties have been adjudicated."*

(Comment.) We ask, is not this case squarely in point here? Why should not these defendants have been allowed to have this case finally tried and determined upon its merits. That is what they sought and it does seem to us that to that they were clearly entitled.

(b) The names of these plaintiffs are often found in the books in actions similar to this. We wish to refer to the case of *Coca Cola Co. v. Branham*, 216 Fed. 264. In that case it was held: "That certain purchasers of 'Coca-Cola' prepared and sold by plaintiff, referred to it as 'Koke' did not entitle plaintiff to enjoin defendants from selling a somewhat similar

beverage under the name of 'Koke,' on the theory that by adoption or user the name 'Koke' had become a secondary trade-name of plaintiff's product, where plaintiff had neither adopted nor used such name in connection with its beverage." (Comment.)

In that action the complainant's bill appears to have been quite similar to the one here filed. The complainant seems to have depended both upon the copyright upon the name "Coca Cola" and upon the color of the beverage and also claimed that the defendant was selling "Koke" as and for "Coca Cola." As to these matters, the court on page 266 said:

"It is true that it appears in testimony that it is the custom of dealers, in serving the two beverages, to remove the tin caps from the bottles, so that the purchaser does not see the name thereon, but that would be true as to any beverage of like or similar color to 'Coca-Cola.' *According to the testimony of plaintiff's agent, there are 181 beverages having practically the same color as Coca-Cola.* Defendants cannot be held responsible for what their customers did without aid, suggestion, or inducement from them.

"Plaintiff also argues that 'Koke' has become the 'secondary name' of its product, because it appears from the proof that some persons desiring that product say to the dealer, 'Give me a Koke.' A trade-name may be acquired by adoption or user. In their brief, counsel for plaintiff quote the following from 38 Cyc. 765:

"'Trade-names are acquired by adoption and user and belong to the one who first used them and gave them a value.'

"But plaintiff has never used the word 'Koke' in con-

nection with its product. It has taken and used the name Coca-Cola. The use of the word, 'Koke,' as applied to the product of plaintiff, has been, so far as the testimony shows, by persons upon their volition without being moved thereto by defendants. If the use of the name had been observed by defendants, and it was afterwards adopted by them, with the purpose and intention of taking advantage of that fact and to engage in the manufacture and sale of a beverage and call it 'Koke,' and sell it 'as and for Coca-Cola,' then a case of unfair competition would undoubtedly be made out."

(Comment.) *The court dissolved the temporary restraining order and dismissed the plaintiff's bill.*

(c) In Foster's Federal Practice, Vol. II, section 291, the author says:

"The plaintiff may dismiss his bill without costs at any time before the defendant's appearance.

"After an appearance *and before a decree or decretal order*, a plaintiff can usually obtain a dismissal upon payment of the costs of such of the defendants as have appeared; *but not, if any of them would be injured thereby.* (n. 'This whole sentence was quoted with approval by Newman J. *re* Wellhouse, 113 Fed. 962; and the text was quoted with approval by Hanford J. in *Hershberger v. Blewitt*, 55 Fed. 170; *Cooper v. Lewis*, 2 Phil. 178; *Ainslie v. Sims*, 17 Beav. 174; *Booth v. Leycester*, 1 Keen. 274; *Bank v. Rose*, 1 Rich. Eq. (S. C.) 292; *Stevens v. The Railroads*, 4 Fed. 97; see *Western Union Tel. Co. v. Am. Bell Tel. Co.*, 50 Fed. 662. (Look at *Ga. P. T. Co. v. Bilfinger*, 129 Fed. 121.))' " (Italics ours.)

(d) In Bates on Federal Equity Procedure, Vol. II, p. 709, section 659, the learned author says (after discussing in the preceding paragraph the English rule, which is the same as in America) :

“The plaintiff in an original bill of equity in the Circuit Court of the United States has, as a general rule, the right at any time, upon payment of costs, to dismiss his bill; *but this rule is subject to a distinct and well settled exception, namely, that after a decree, whether final or interlocutory, has been made, by which the rights of a party defendant have been adjudicated, or such proceedings have been taken as entitled the defendant to a decree, the plaintiff will not be allowed to dismiss his bill without the consent of the defendant; and it is well settled that the plaintiff can in no case dismiss his bill without an order of court.*” (Italics ours.)

(Citing Chicago & Alton R. R. Co. v. Union R. Mill Co., 109 U. S. 702; quote Stevens v. The Railroads, 4 Fed. 97; Electric Accumulator Co. v. Brush El. Co., 44 Fed. R. 602; Hat-Sweat Mfg. Co. v. Waring, 46 Fed. 87; Hershberger v. Blewett, 55 Fed. 170; Am. Bell Tel. Co. v. Western Union Tel. Co., 69 Fed. 666; Carner v. Second National Bank, 66 Fed. 369; Pullman Pal. Car Co. v. Central Transf. Co., 49 Fed. 261; City of Detroit v. Detroit City R. R. Co., 55 Fed. 596; Gregory v. Pike, 67 Fed. 837.)

(e) C. & A. R. R. Co. v. Union Rolling Milling Co., 109 U. S. 703, and beginning on page 713 the court says:

“The appellants contend that Dumont, the original complainant, had the right at any stage of the case to dismiss his bill, and that its dismissal would carry with it the cross-bill, and that having made the motion to dismiss, which was erroneously overruled, all the subsequent proceedings and decrees are erroneous.

“It may be conceded that when an original bill is dismissed before final hearing, a cross-bill filed by a defendant falls with it. It may also be conceded that, as a general rule, a complainant in an original bill has the right at any time, upon payment of costs, to dismiss his bill. But this latter rule is subject to a distinct and well settled exception, namely, that after a decree, whether final or interlocutory, has been made, by which the rights of a party defendant have been adjudicated, or such proceedings have been taken as entitle the defendant to a decree, the complainant will not be allowed to dismiss his bill without the consent of the defendant.

“The rule is stated as follows in Daniell’s Chancery Practice, page 793, 5th Am. Ed.:

“*‘After a decree or decretal order the court will not allow a plaintiff to dismiss his own bill, unless upon consent, for all parties are interested in a decree, and any party may take such steps as he may be advised to have the effect of it.’*

“The same writer, page 794, says that:

“*‘After a decree has been made, of such a kind that other persons besides the parties on record are interested in the prosecution of it, neither the plaintiff nor defendant, on the consent of the other, can obtain an order for the dismissal of the bill.’*

“The rule, as we have stated it, is sustained by many adjudicated cases. It was laid down by the lord chancellor in *Cooper v. Lewis*, 2 Phillips Ch. 181, as follows:

“‘The plaintiff is allowed to dismiss his bill on the assumption that it leaves the defendant in the same position as he would have stood if the suit had not been instituted; it is not so where there has been a proceeding in the cause which has given the defendant a right against the plaintiff.’

“In *Bank v. Rose*, 1 Rich. Eq. (S. C.) 294, it was said:

“‘*But whenever, in the progress of a cause, the defendant entitles himself to a decree, either against a complainant or a co-defendant, and the dismissal would put him to the expense and trouble of bringing a new suit or making new proofs, such dismissal will not be permitted.*’

“So in the case of *Connor v. Drake*, 1 Ohio St. 170, the Supreme Court of Ohio declared:

“‘The propriety of permitting a complainant to dismiss his bill is a matter within the sound discretion of the court, which discretion is to be exercised with reference to the rights of both parties, as well the defendant as the complainant. After a defendant has been put to trouble in making his defense, if in the progress of the case rights have been manifested that he is entitled to claim, and which are valuable to him, it would be unjust to deprive him of them merely because the complainant might come to the conclusion that it would be for his interests to dismiss his bill. Such a mode of proceeding would be trifling with the

court as well as with the rights of defendants. We think the court did not err in its ruling in refusing to permit complainant to dismiss his bill.'

"Chancellor Walworth in the case of *Wall v. Crawford*, 11 Paige 472, laid down the rule in these words:

"Before any decree or decretal order has been made in a suit in chancery, by which a defendant therein has acquired rights, the complainant is at liberty to dismiss his bill upon payment of costs; but after a decree has been made by which a defendant has acquired rights, either as against a complainant or against a co-defendant in the suit, the complainant's bill cannot be dismissed without destroying those rights. The complainant in such a case cannot dismiss without the consent of all parties interested in the decree, nor even with such consent, without a rehearing, or upon a special order to be made by the court.'"

See also *Guilbert v. Hawles*, 1 Ch. Cas. 40; *Bluck v. Colnaghi*, 9 Sim. Ch. 411; *Lashley v. Hogg*, 11 Ves. Jr. 602; *Booth v. Leycester*, 1 Keen's Ch. 255; *Biscoe v. Brett*, 2 Vesey & B. 377; *Collins v. Greaves*, 5 Hare 596; *Gregory v. Spencer*, 11 Beav. 143; *Carrington v. Holly*, 1 Dick. 280; *Anon.*, 11 Ves. Jr. 169; *Cozzens v. Sisson*, 5 R. I. 489; *Opdyke v. Doyle*, 7 R. I. 461; *The Atlas Bank v. The Nahant Bank*, 23 Pick. 491; *Bethia v. M'Kay*, Cheve's Eq. (S. C.) 96; *Sayer's Appeal*, 79 Penn. St.; *Seymour v. Jerome*, Walk. Mich. Ch. 356.

(f) In *Electric Accumulator Co. v. Brush Electric Co.*, 44 Fed. 602, the court says:

“While there is no doubt of the general proposition that a plaintiff in an equity suit may dismiss his bill at any time before the hearing, *it is equally well settled that he cannot do so without an order of court*,—a practice which implies a certain discretion on the part of the court to refuse such order if, under the particular facts of the case, *a dismissal would be prejudicial to the rights of the defendant*. Leave to discontinue has been denied where the defendant has set up a counter-claim which would be barred by the statute of limitations. *Van Alen v. Schermerhorn*, 14 How. Pr. 287. Where the defendant pleaded an estoppel, which, if established, would amount to a defeasance of a lien claimed by the plaintiff on his property, and which it was the object of the bill to enforce: *Stevens v. Railroad*, 4 Fed. Rep. 97,—a most satisfactory opinion by Judge Hammond. Where defendant sought to dismiss his cross-bill after the original and cross-bill had been set down to be heard together; the court remarking that the plaintiff could not dismiss his bill when by so doing he might prejudice the defendant: *Booth v. Leicester*, 1 Keen 247. Where a general demurrer had been overruled upon argument, and defendant had appealed: *Cooper v. Lewis*, 2 Phil. Ch. 178. After an order to account and a report has been made: *Bethia v. McKay*, Cheves Eq. 93, overruling *Bossard v. Lester*, 2 McCord Eq. 419. Or where a cross-bill was filed to a bill of foreclosure: *Bank v. Rose*, 1 Rich. Eq. 292; the court observed that *‘whenever, in the progress of a cause, a defendant entitles himself to a decree, either against the complainant or against a co-defendant, and the dismissal would put him to the expense and trouble*

of bringing a new suit, and making his proofs anew, such dismissal will not be permitted.' "

(g) In *Hat-Sweat Mfg. Co. v. Waring*, 46 Fed. 87, held:

"A complainant is not entitled as of right to dismiss a bill after the answer is filed, setting up that the license to use a patent upon which the suit is brought is fraudulent and void, and showing that defendant is entitled to a decree for its cancellation."

In this case Judge Lacombe said:

"Should the defense set up by the defendants be made out by the proof, they would be entitled to a decree not simply denying complainant's right to money damages, or an accounting, but also declaring the license upon which the suit is brought to be fraudulent and void, and directing its cancellation. The complainant is, therefore, under the authorities, not entitled as of right to dismiss its own bill at this stage of the case. Electrical Accumulator Co. v. Brush Electric Co., 44 Fed. Rep. 602; Stevens v. Railroads, 4 Fed. Rep. 97. Nor, under all the circumstances, should it be allowed to do so. If complainant suffers default, defendants may take a decree dismissing the complaint, declaring the license void, and directing its cancellation; but such decree will, of course, show upon its face that it was entered upon default. Should the complainant be unwilling to suffer default, the time to file briefs named in the former order is extended to and including April 6th, and they need not be printed." (Italics ours.)

(h) In *Pullman's Palace-Car Co. v. Central Transp. Co.*, 49 Fed. 262, the court says:

"Butler, district judge. The bill which the plaintiff asks leave to withdraw, avers (among other things) that the lease therein named is invalid; and furthermore, that (if it is not) the plaintiff is authorized by its eighth section, and the happening of a contingency therein stated, to terminate it, on notice to the defendant; that the contingency has happened, the authority been exercised and notice given. It therefore prays the court to enjoin the defendant against proceeding at law to collect rent under the lease; to assist the plaintiff in making delivery of the leased property, and in ascertaining what compensation should be rendered to the defendant for its previous use; and generally to afford its aid in settling the controversy which has arisen out of the transactions between the parties, and terminating finally, their relations. The court, acknowledging the plaintiff's right to terminate the lease under the circumstances stated, granted an injunction against proceeding at law to recover rent accruing subsequently to such notice; and declined to interfere with an action, then pending, brought to recover rent previously due, because the question of validity raised, could be interposed and decided on the trial thereof. Subsequently on such trial, and review by the Supreme Court, the lease was found to be invalid. The plaintiff in the bill now seeks to discontinue proceedings under it, while the defendant endeavors, through the instrumentality of a cross-bill, to avail himself of its use as a means of recovering possession of his property, or its equivalent, and com-

pensation for the plaintiff's enjoyment of it under the lease. We do not think the plaintiff's motion should prevail. *The propriety of allowing discontinuances in equity depends upon whether defendants may be prejudiced thereby. A decree, or decretal order, entered is usually a conclusive answer to the application.* Here, not only was such an order entered, but it now appears that the proceeding, or a similar independent one commenced by himself, is the defendant's only means of enforcing his rights—rights which the bill in a measure concedes. The principal object of the proceeding, originally, was to accomplish the object which the defendant now seeks; and considerable testimony has been taken with a view to this end. The defendant would, therefore, be seriously prejudiced by its discontinuance. Not only would he lose the benefit of this testimony, but he would also be delayed, and might be compelled to seek the plaintiff in another jurisdiction. The object of the cross-bill is to enable the defendant to assume an aggressive attitude in the proceeding, and to use it as a means of settling and closing up the entire controversy on which it is founded. This object seems proper and commendable; and we do not find anything in the rules governing equity pleading, which forbids its allowance. The decisions in which it has been held that cross-bills come too late after answers have been filed—that they should be presented as soon as practicable, so as to avoid delaying the plaintiff's efforts to obtain a trial,—are not applicable to the circumstances of this case. The plaintiff's motion must therefore be dismissed and the defendant's allowed.” (Italics ours.)

(i) In *Am. Bell Tel. Co. v. Western Union Tel. Co.*, 69 Fed. 670, the court says:

“The single question contested is the right of the complainant thus to dismiss their bill. To the discussion of this question great learning and extensive examination of authorities have been devoted. But in the opinion of this court the question lies in narrow compass. *All the authorities recognize that in the progress of a suit a stage may be reached when the right of the complainant to end the cause by dismissing his bill ceases. With sufficient exactness, the decisive point may be said to be when the cause has proceeded so far as to give the defendant rights of which he would be deprived by allowing the dismissal of the bill by the complainant on his motion. Such rights were acquired in this cause by the reference of the parties to the master, approved and confirmed by the decretal order of the court. The defendant, by the concurrent force of the stipulation of the parties to refer to the master ‘to hear the parties, report the facts, and his rulings on any question of law arising in the case,’ and of the order of court, acquired the right to have the hearing before the master, his report, and the decision of the master thereupon. Neither party could, at his pleasure, revoke or rescind the reference so made and confirmed.*” (Italics ours.)

(Comment.) The appellants call especial attention to the foregoing holding of the court.

If the reference of a case to a master constitutes a “decretal order” and deprives the complainant of the right to dismiss its case, did not the order—after hear-

ing—denying the right to a temporary injunction, and the order setting the case for trial upon the motion of the plaintiff, place this complainant in the same position? We think the cases which we have cited in our brief and this argument make this proposition perfectly clear and conclusive.

We have tried to show by our statement of facts, our brief and the cases cited in this argument that the order dismissing this case and the decree following it were very prejudicial to the defendants and against law. We think the cases clearly support our position that the decree and order dismissing the case should be reversed and set aside and that these defendants have a right to try this case in the tribunal selected, in the first instance, by this complainant, or the complainant should submit to a final decree upon the merits.

Begging pardon for the length of our brief, we respectfully submit the matter to the court.

SIDNEY J. PARSONS,
Attorney for Defendants and Appellants.

United States
Circuit Court of Appeals,
FOR THE NINTH CIRCUIT.

The Coca Cola Company,
Appellee,

vs.

Rose Orr and Frank Orr, Doing
Business as Orr Drug Co., or
Orr Pharmacy,
Appellants.

BRIEF OF APPELLEE.

O'MELVENY, STEVENS & MILLIKIN,
O'MELVENY, MILLIKIN & TULLER,
ROY V. REPPY,
CANDLER, THOMSON & HIRSCH,
Solicitors for Appellee.



United States
Circuit Court of Appeals,
FOR THE NINTH CIRCUIT.

The Coca Cola Company,	}
<i>Appellee,</i>	
<i>vs.</i>	
Rose Orr and Frank Orr, Doing Business as Orr Drug Co., or Orr Pharmacy,	
<i>Appellants.</i>	}

BRIEF OF APPELLEE.

STATEMENT OF THE CASE.

This is an appeal from an order and decree granted on complainant's motion, dismissing the cause without prejudice. Without going over all the ground covered by appellants in the statement of facts set forth in their brief, we desire to call attention to certain elements of the situation which we deem important on this appeal.

It should be noted that at the time the motion to dismiss was heard, no testimony had been taken in the cause and no decree of any sort, establishing any right of the defendants or giving them any advantage which

would be lost by the dismissal, had been rendered. From the affidavits filed it appears furthermore that practically the sole matter in issue between the parties was whether or not the defendants had been guilty of selling as Coca Cola any substance that was not in fact Coca Cola. Defendants did not and do not, as we understand it, dispute the rights asserted by complainant growing out of the establishment of the trade name Coca Cola; nor have defendants, by their pleadings or proof, claimed any right to sell any particular substance or article without infringing complainant's rights. There is nothing whatever in the case, it is submitted, in the nature of an application by defendants for leave to continue their business on any particular basis, as counsel seems to intimate on page 6 of appellant's brief, and as is claimed in defendants' fourth assignment of error [Tr. page 99].

We have referred to the affidavits appearing in the transcript. We question, however, whether this court can take any of said affidavits into consideration on this appeal, for the reason that appellants have taken no steps to incorporate the affidavits into the record in any manner consistent with proper practice. This point will be elaborated in the part of our brief devoted to the argument. If this contention is well founded, this court has nothing whatever before it to show what was the basis of the lower court's order denying to complainant a preliminary injunction, nor to show what was the basis of defendants' opposition to the motion to dismiss, nor what equities were considered by the court upon said motion. The record as

it stands presents the bare question, as we see it, whether in a case in which no affirmative relief is claimed by defendants and no testimony has been taken and no legal advantage has been obtained by defendants which would be prejudiced by the dismissal, it is an abuse of discretion on the part of the trial court to grant a motion to dismiss after having previously denied an application for preliminary injunction.

ARGUMENT.

I.

Upon Review of an Order Made After a Hearing on Affidavits, the Affidavits Used Cannot Be Considered by the Appellate Court Unless They Have Been Made Part of the Record by Statement or Bill of Exceptions Showing That They Were Used in the Lower Court Upon Said Hearing.

While it is true as a general statement that a bill of exceptions is not known to equity practice, yet it has always been required, as we understand it, that evidence considered by the court below be made part of the record in order that it may be reviewed on appeal. Evidence taken by deposition becomes, upon filing, a part of the record; but this, according to the authorities, is not true of affidavits.

“Affidavits are not a part of the record proper, even though they are filed, unless made so by an order, entered on the minutes of the court, in the nature of a bill of exceptions.”

Street on Federal Equity Practice, section 1300.

“As a general rule affidavits are not part of the record proper, because they are in the nature of evidence, and cannot be considered, even though copied into the transcript or attached to the brief or a petition in error, or even though appearing in connection with the motion, or filed with the papers in the case; they must be presented as part of the appeal record in the manner required by the practice in the particular jurisdiction, which is usually by bill of exceptions, statement, settled case, order of court, or, *if the proceeding is in equity, by certificate of evidence; and the record must also show that the affidavits were presented to and considered by the court.*” (Italics ours.)

4 Corpus Juris, 143-145.

“In a chancery case the pleadings, and all matters set out and admitted therein, the exhibits thereto, all stipulations, master’s reports, and other papers filed in the cause as a part thereof, become a part of the record without being preserved by a certificate of evidence. Evidence in chancery cases regularly taken by deposition in accordance with the ancient practice becomes a part of the record, and will be considered on appeal without being made a part of the record by certificate. But testimony taken orally at the hearing must be made a part of the record by a bill of exceptions, certificate of evidence, or other authorized mode. *Affidavits read in evidence are not a part of the record, unless made so by certificate of evidence.*” (Italics ours.)

4 Corpus Juris 383.

Under the new equity rules (Rule 75) there can surely be no doubt on this point. Affidavits are in the

nature of evidence, and must be brought into the record in the manner pointed out in the rules—by statement approved by the court or judge.

We refer also to the following decided cases in which the need of a statement or bill of exceptions to authenticate affidavits used on motion is pointed out. While these cases are nearly all at law instead of in equity, it would seem that the same principles should apply.

Hildreth v. Grandin, 97 Fed. 870:

Writ of error to Circuit Court of Appeals, 8th Circuit, complaining of refusal of the court to vacate order of dismissal of suit in ejectment. No bill of exceptions had been settled making the motion to vacate and the evidence heard thereon a part of the record. Held that the action of the trial court cannot be reviewed without bill of exceptions.

Sargeant v. State Bank of Indiana, 12 How. 371, 385:

The court declared that the mere fact that a paper is found in the files of a cause does not itself constitute it part of the record. "In order to render it part of the record it should form some part of the pleadings in the case, or be brought under and ingrafted upon the action of the court by some motion from the parties."

Bassing v. Cady, 208 U. S. 386:

"Papers or documents used at the hearing in the court below cannot in strictness be examined

here unless they are made part of the record by bill of exceptions or in some other proper mode.”

El Dorado Coal Mining Co. v. Mariotti, 215
Fed. 51:

Writ of error to Circuit Court of Appeals, 7th Circuit, complaining of refusal to dismiss cause for want of jurisdiction. The printed record contained what purported to be a motion to dismiss, also order denying motion to dismiss, but there was no bill of exceptions preserving any motion or ruling thereon. Held, the matter was not properly before the court. “Motions based on matters *dehors* the record are expressly held to be not a part of the record unless preserved in a bill of exceptions or otherwise saved.”

II.

There Was No Error or Abuse of Discretion in Granting Leave to Complainant to Dismiss. While a Decretal Order Had Been Entered in the Cause, It Was Not Such an Order as Gave to Defendants Any Legal Advantage in the Principal Litigation Which Was Lost by the Dismissal. It Is Only That Kind of a Decretal Order Which Bars the Right of Dismissal.

The above heading shows that we take issue with counsel for appellants on his sixth point of law set out on page fourteen of his brief. It may be admitted that the passage from Foster's Federal Practice, Volume II, section 291, quoted on page twenty-two of appellant's brief, appears to sustain their position, and

also that the remark made by Judge Butler in the case of *Pullman's Palace Car Company v. Central Transportation Company*, 49 Fed. 262, that a decree or decretal order entered is usually a conclusive answer to an application for leave to dismiss, would seem to indicate that the mere issuance of a decretal order without more may operate as a bar to dismissal. We believe, however, that both of these authorities may be reconciled with the general proposition usually laid down that only those decretal orders which give a defendant some advantage in the litigation which a dismissal would wipe out have the effect of barring the right to dismiss. If it is not possible to make this reconciliation, the authorities mentioned stand opposed to an overwhelming weight of authority to the contrary. We desire to quote from two text authorities which were not cited by appellants. Both Simkins, in his work on "A Federal Equity Suit," and Street, in his treatise on Federal Equity Practice, have valuable chapters upon the questions of law involved in a complainant's application to dismiss a bill. The first named text writer lays down the general rule as follows:

"The general rule is that the plaintiff has the right, at any time before an interlocutory or final decree in a case, to dismiss it on paying costs, and without prejudice to his right to file another, and where the dismissal will deprive the defendant of no substantial right accrued since the suit commenced and the defendant has not prayed for affirmative relief to which he would be entitled."

Simkins—A Federal Equity Suit, page 349.

It will be noticed that a “decretal order” is not mentioned, and that it is only a *decree*, interlocutory or final, which affects complainant’s right.

The following from Professor Street’s work is a clear exposition of the subject:

“Sec. 1329. Generally speaking, the plaintiff is entitled to have a dismissal, if he wants it, at any time before the cause is finally heard; but this privilege is not absolute, and it is subject to be controlled by the court upon due reference to the rights of the defendant. Before a plaintiff will be denied leave to dismiss it should appear that the suit has progressed so far that the defendant is either entitled to a decree or that some injury or prejudice would result to him from the dismissal. All the authorities recognize that in the progress of a suit a stage may be reached when the right of the plaintiff to end the cause by dismissing his bill ceases. With sufficient exactness the decisive point may be said to be when the cause has proceeded so far as to give the defendant some right of which he would be deprived by allowing the dismissal of the bill by the plaintiff on his own motion.

“Sec. 1330. Prejudice to the defendant, then, is a factor sufficient to defeat the right of the plaintiff to dismiss. If it appears that the dismissal of the bill would deprive the defendant of some litigable right that he is entitled to enforce in that suit, or perhaps even if it appears that by the dismissal he would be subjected to some disadvantage or deprived of some equity, the leave to dismiss will be refused. *It will be noted, in this connection, that the mere possibility that*

the defendant may be harassed by another litigation directed to the same object is not enough to disentitle the plaintiff to dismiss. The prejudice that the law contemplates as sufficient to authorize a denial of the plaintiff's motion to dismiss must be 'some plain, legal prejudice other than a mere prospect of future litigation rendered possible by the dismissal of the bill.' But if, beyond the incidental annoyances of a second litigation upon the same subject-matter, such action would be manifestly prejudicial to the defendant, leave to dismiss will not be granted.

"On the question as to what will constitute a sufficient prejudice to the defendant to justify a refusal of leave to dismiss, the courts very properly exercise a considerable latitude of judicial discretion; *and except in a case where there is an obvious violation of a fundamental rule or an abuse of the discretion of the court, the action of the circuit court in granting or refusing leave to dismiss will not be reversed.*" (Italics ours.)

Street—Federal Equity Practice, pages 804-806.

Here, again, the emphasis is laid upon the matter of possible legal prejudice to the defendant by the dismissal. This, we submit, is the real basis upon which all the decisions refusing leave to dismiss are founded. It is a basis consistent with equity and logic. The rule contended for by appellants, on the other hand, namely, that the mere fact of rendition of a decretal order is a bar to complainant's right to discontinue, is a mere rule of thumb without logical basis. In those cases where rendition of a decretal order involves no advantage to defendant, there is clearly no

logic or equity in denying complainant the right to dismiss merely because of such decretal order. In considering the decisions on this point, we shall first refer to a number in support of our position and then discuss the decisions cited by appellants.

In the following federal court cases motions to dismiss made by complainant were granted:

Pennsylvania Globe Gaslight Co. v. Globe Gaslight Co., 121 Fed. 1015;

Penn Phonograph Co. v. Columbia Phonograph Co., 132 Fed. 808;

Gilmore v. Bort, 134 Fed. 658;

Morton Trust Co. v. Keith, 150 Fed. 606;

Houghton v. Whitin Machine Works, 160 Fed. 227;

Thompson-Houston Electric Co. v. Holland, 160 Fed. 768;

Staude Mfg. Co. v. Labombarde, 229 Fed. 1004;

Young v. Samuels, 232 Fed. 784.

The first of the above listed cases indicates the practice followed in the District Court of Massachusetts. The following is from the opinion rendered in that case by Judge Colt:

“The general rule that a complainant has the right to dismiss his bill at any time before hearing is too firmly established to require any citation of authority. It is equally well settled that the annoyance to the defendant of a second litigation is no ground for refusing to dismiss the bill. The only question which can arise in any given case

is whether the complainant comes within the exceptions to the rule. These exceptions may be briefly stated: First, where the dismissal would deprive the defendant of some substantial right which has accrued to him since the suit was commenced; second, where the defendant prays for, or is entitled to, some affirmative relief, as, for example, where there is a cross-bill.

“The case at bar does not fall within either of these exceptions. The bill is the ordinary one for infringement of a patent. The evidence is closed, the record printed, the case put upon the calendar, and, by order of the court, stands for hearing. During the progress of the suit the defendant has acquired no substantial right, and it asks for no affirmative relief. So far as appears, the defendant is in no way prejudiced by the dismissal of this suit further than his liability to a second suit for the same cause of action.”

121 Fed. 1015, 1016.

In the later case in the same court, *Morton Trust Company v. Keith*, *supra*, the rule laid down in the above-quoted passage was referred to as the established practice of the Massachusetts Circuit Court. Defendant in the *Morton Trust Company* case requested the court to impose terms, in addition to the payment of costs. This the court refused to do, holding that since, under the established practice, the complainant had the absolute right to dismiss upon payment of costs, there could be no imposition of additional terms without changing the rule. The case of *Houghton v. Whitin Machine Works*, *supra*, is another from the Circuit Court of Massachusetts in

which the established practice of that court was followed.

The case of *Gilmore v. Bort*, *supra*, is from the Circuit Court of the Northern District of Iowa. Dismissal was allowed there, although a cross-bill had been filed by the defendant. The court, upon analysis of the so-called cross-bill, found, however, that it was in no true sense a cross-bill, since the matters alleged against complainants were either available in defense to the original bill or were not germane to matters alleged in the original bill. The general principle with regard to dismissal is thus laid down.

“The general rule is that the complainant in an original bill has the right at any time before the final hearing, upon payment of costs, to dismiss his bill without prejudice. This rule, however, is subject to the exception that, where such dismissal would be manifestly prejudicial to the defendant, it will not be permitted. The prejudice, however, to the defendant, that will authorize the denial of the complainant’s motion to dismiss his bill, must be some plain, legal prejudice, other than a mere prospect of future litigation rendered possible by the dismissal of the bill.”

134 Fed. 660.

In the very recent case of *Staudt Manufacturing Company v. Labombarde*, *supra*, the District Court of New Hampshire, in permitting a dismissal, pointed out that there had been no hearing touching the merits of the controversy and that although considerable expense had been incurred in taking testimony and doing other things, the evidence was not closed upon either

side. Judge Aldrich saw no ground, therefore, for saying that any substantial rights had accrued to defendant which would warrant him in requiring the plaintiff to remain in court and carry forward the litigation with reference to the patents in question.

The case of *Young v. Samuels*, *supra*, was decided by the District Court of Rhode Island. Judge Brown referred to the opinion of Mr. Justice Woodbury in *Folger v. Shaw*, Fed. Cas. No. 4899, where the guiding principle was assumed that discontinuance might be allowed to the plaintiff at any time up to that point of progress in the case where the court had been furnished with means for the court's final decision. Judge Brown stated that the case before him, so far as had been made to appear, had not reached the point where material was present for a judgment on the merits.

The case is valuable for the full citation of authority given on page 787.

We come now to the two cases in the above list upon which we principally rely, for they are, we believe, on all fours with the case at bar. In both there had been proceedings on application for temporary injunction before motion to dismiss was made.

Penn Phonograph Company v. Columbia Phonograph Company, *supra*, was an appeal to the Circuit Court of Appeals, 3d Circuit, from an order made by the Circuit Court for the Eastern District of Pennsylvania, granting complainant's motion to dismiss. Suit had been filed December 4, 1902, and on December 16, 1902, complainant's motion for a preliminary in-

junction based on affidavits and opposed by affidavits and answer on oath, was heard and denied. On April 6, 1903, complainant filed its petition praying that the bill might stand dismissed. The motion was granted and a decree entered dismissing the bill without prejudice. The following is from the decision of the Circuit Court of Appeals:

“Upon this appeal, then, the decree allowing the dismissal of the bill should not be reversed unless it clearly appears that there was a violation of some established rule prevailing in equity, or an abuse of the legal discretion of the court. In *Pullman’s Car Co. v. Central Transportation Co.*, 171 U. S. 138, 146, 18 Sup. Ct. 808, 811, 43 L. Ed. 108, the Supreme Court, after referring to decisions upon this subject, said:

“‘From these cases we gather that there must be some plain, legal prejudice to defendant, to authorize a denial of the motion to discontinue. Such prejudice must be other than the mere prospect of future litigation rendered possible by the discontinuance. If the defendants have acquired some rights which might be lost or rendered less efficient by the discontinuance, then the court, in the exercise of a sound discretion, may deny the application. *Stevens v. The Railroads (C. C.)*, 4 Fed. 97, 105. Unless there is an obvious violation of a fundamental rule of a court of equity, or an abuse of the discretion of the court, the decision of a motion for leave to discontinue will not be reviewed here.’

“We are not able to see that the court below violated any rule of equity practice, or abused its legal discretion, in making the decree here complained of. No testimony had been taken in the

case, and there had been no hearing or decree upon the merits. The hearing of the motion for a preliminary injunction upon opposing *ex parte* affidavits and the denial of the motion did not bar the dismissal of the bill by permission of the court in the exercise of its sound discretion. Nor was leave to dismiss precluded because the defendant was called on to answer the bill under oath, and did so. The appellant, we think, was deprived of no substantial right by the dismissal. We cannot agree that future litigation thus made possible amounted to legal prejudice."

132 Fed. 809, 810.

It is submitted that this case represents a situation substantially the same as that before this court in the case at bar.

The other case which we consider on all fours is *Thompson-Houston Electric Company v. Holland*, *supra*, a decision from the Circuit Court for the Northern District of Ohio. There a bill of complaint was filed on January 24, 1906, for injunction and other relief growing out of an alleged infringement of a patent. On March 8, 1906, a preliminary injunction was decreed. An appeal was taken which resulted in a reversal of the decision granting the preliminary injunction and a remanding of the case for further proceedings. Thereafter, motion was made by complainant for leave to discontinue without prejudice. The court granted the motion, stating:

"The general rule is, stated in the form most favorable to the defendants, that a motion to discontinue without prejudice upon payment of

costs will be allowed where no rights have attached to the defendants, as by a cross-bill, or where no testimony has been taken. I know of no case where it is held, and I can conceive of no reason why it should be held, that where no testimony has been taken, and no cross-bill filed, the complainant would not have the right to dismiss his case. To hold otherwise would be to say that the courts are anxious to encourage litigation. As declared by the court in *Pennsylvania Globe Gaslight Co. v. Gaslight Co.* (C. C.), 121 Fed. 1015, the annoyance to the defendant of the second litigation is no ground for refusing to dismiss the bill."

Coming now to the discussion of the cases relied on by appellants, we make the general preliminary statement that in every one of the instances in which complainant's motion to discontinue was denied, the litigation had reached a stage where the defendant had obtained some advantage which would be lost to him by the dismissal, so that the dismissal would operate as legal prejudice. This, as we have previously shown, is the true test. In the following cases, *Stevens v. The Railroads*, 4 Fed. 97; *Electrical Accumulator Co. v. Brush Electric Co.*, 44 Fed. 602; *Hat-Sweat Mfg. Co. v. Waring*, 46 Fed. 87, and *Chicago & Alton Railroad Co. v. Union Rolling Mill Co.*, 109 U. S. 702, the defendants had either filed cross-bills or were entitled under their pleadings to affirmative relief. Dismissal would therefore have been highly prejudicial.

In *American Bell Telephone Co. v. Western Union Telegraph Co.*, 69 Fed. 670, upon which appellants

place special reliance, there had been a reference to a master, in which both parties had joined, and a decision had been announced in draft form by the master in favor of the defendant. Furthermore, as Professor Street points out in section 1334 of his treatise on Federal Equity Practice, the suit having been for an accounting the defendant was entitled to affirmative relief to the extent of any balance found in his favor.

In the case of *Hershberger v. Blewett*, 55 Fed. 170 (Circuit Court Northern District Washington), which was a suit involving title to real estate, ruling had been made upon demurrers and exceptions to the answer and the time for introduction of testimony by the plaintiff had expired. Thus the case was practically ready for final determination upon the pleadings. The rulings on demurrers and exceptions to the answer, furthermore, were decretal orders which conferred a legal advantage in the litigation upon the defendant which would have been entirely lost had the case been dismissed. The court was also influenced by the fact that the claim in litigation affected the title to numerous lots in Seattle and that prejudice to the lot owners would result from delay in settlement of the question.

In the case of *Pullman's Palace Car Company v. Central Transportation Company*, 49 Fed. 262, S. C. 171 U. S. 138, the prejudice which would have been sustained by the defendant if dismissal had been allowed consisted in a loss of the advantage it had obtained by reason of certain offers to do equity which

appeared in complainant's bill. The Supreme Court laid down the governing principles in the following language:

"The general proposition is true that a complainant in an equity suit may dismiss his bill at any time before the hearing, but to this general proposition there are some well-recognized exceptions. Leave to dismiss a bill is not granted where, beyond the incidental annoyance of a second litigation upon the subject-matter, such action would be manifestly prejudicial to the defendant. The subject is treated of in *Detroit v. Detroit City Railway Company*, in an opinion by the Circuit Judge, and reported in 55 Fed. Rep. 569, where many of the authorities are collected, and the rule is stated substantially as above. The rule is also referred to in *Chicago & Alton Railroad v. Union Rolling Mill Co.*, 109 U. S. 702.

"From these cases we gather that there must be some plain, legal prejudice to defendant to authorize a denial of the motion to discontinue; such prejudice must be other than the mere prospect of future litigation rendered possible by the discontinuance. If the defendants have acquired some rights which might be lost or rendered less efficient by the discontinuance, then the court, in the exercise of a sound discretion, may deny the application. *Stevens v. The Railroads*, 4 Fed. Rep. 97, 105. Unless there is an obvious violation of a fundamental rule of a court of equity or an abuse of the discretion of the court, the decision of a motion for leave to discontinue will not be reviewed here.

"Upon an examination of the facts relating to the motion, we think the Circuit Court was right,

in the exercise of its discretion, in denying the same.”

171 U. S. 145, 146.

It is significant, furthermore, as we see it, that the Supreme Court in its opinion did not repeat the remark with reference to decretal orders which appeared in the decision of the Circuit Court and which appellants have italicized on page thirty of their brief.

It is submitted that appellants are wholly unable to show in the case at bar that any prejudice will come to them by reason of the dismissal of the bill other than such annoyance as they may be put to by further litigation in the same or other courts; that at the time the motion to dismiss was made, the case had not reached a point where any rights whatever had been adjudicated; nor had the cause proceeded to a point where the court could be certain as to what ought to be the final disposition of the cause. This latter seems clear from the fact that the order denying the preliminary injunction stated that it was without prejudice to renewal of complainant's application. [Tr. 87.]

We respectfully submit that the decree of dismissal should be affirmed.

O'MELVENY, STEVENS & MILLIKIN,
O'MELVENY, MILLIKIN & TULLER,
ROY V. REPPY,
CANDLER, THOMSON & HIRSCH,
Solicitors for Appellee.

United States
Circuit Court of Appeals ⁷
For the Ninth Circuit.

THE SHARPLESS SEPARATOR COMPANY,
a Corporation,

Plaintiff in Error,

vs.

W. W. SKINNER,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court
of the Southern District of California,
Southern Division.

Filed

JUL 3 - 1917

F. D. Monckton,
Clerk.

United States
Circuit Court of Appeals
For the Ninth Circuit.

THE SHARPLESS SEPARATOR COMPANY,
a Corporation,

Plaintiff in Error,

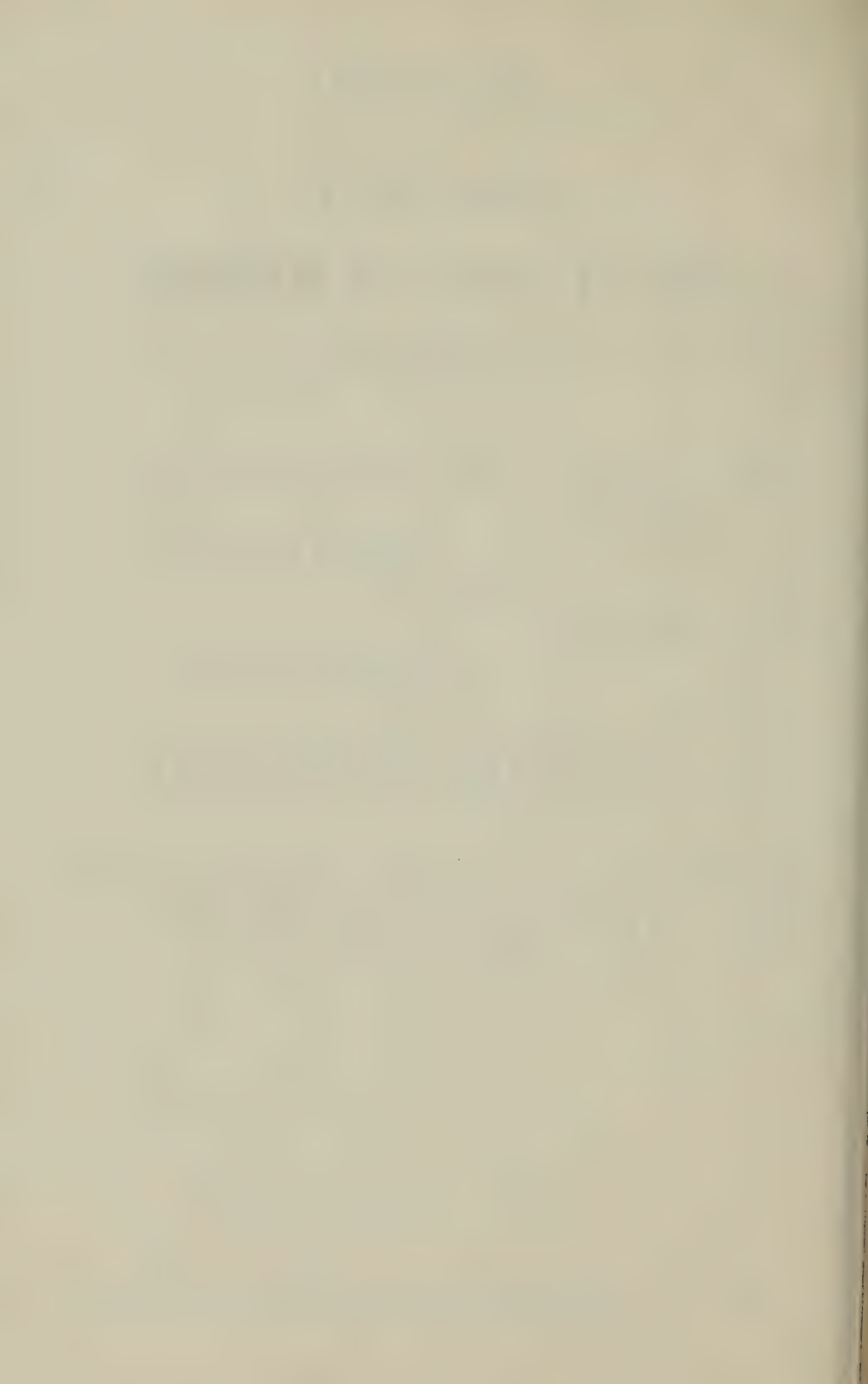
vs.

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Upon Writ of Error to the United States District Court
of the Southern District of California,
Southern Division.



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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*In the District Court of the United States, in and for
the Southern District of California, Southern
Division.*

No. 413—CIVIL.

W. W. SKINNER,

Plaintiff,

vs.

THE SHARPLES SEPARATOR COMPANY, a
Corporation,

Defendant.

Writ of Error.

United States of America,—ss.

The President of the United States, to the Honorable
OSCAR A. TRIPPET, Judge of the Above-
entitled Court, GREETING:

Because in the record and proceedings, as also in
the giving, making and rendition, entry and filing of
the final judgment in that certain cause in the above-
entitled court, before you, between the above-named
plaintiff and the above-named defendant, manifest
error hath happened to the great prejudice and dam-
age of said defendant corporation, as is stated and
appears by the petition herein:

We being willing that error, if any hath been,
should be duly corrected, and full and speedy justice
done to the party defendant aforesaid, in this behalf
do command you, if justice be therein given, that
then under your seal, distinctly and openly, you send
the record and proceedings aforesaid, with all things

concerning the same, to the [5*] Justices of the United States Circuit Court of Appeals for the Ninth Circuit, in the city and county of San Francisco, in the State of California, together with this writ, so as to have the same at the said place in the said circuit, on the 26th day of March, A. D. 1917, that the said records and proceedings being inspected the said Circuit Court of Appeals may cause further to be done therein to correct those errors what of right, and according to the laws and customs of the United States, should be done.

WITNESS, the Honorable EDWARD DOUGLAS WHITE, Chief Justice of the Supreme Court of the United States, this 27th day of February, A. D. 1917.

ATTEST my hand and the seal of the above-entitled court at the Clerk's office thereof, at the city and county of Los Angeles, State of California, on the day and year last above written.

[Seal]

WILLIAM M. VAN DYKE,

Clerk of Said Court.

By Chas. N. Williams,

Deputy Clerk.

Allowed this 27th day of February, A. D. 1917.

OSCAR A. TRIPPET,

Judge of Said Court.

I hereby certify that a copy of the within writ of error was on the 27th day of February, 1917, lodged in the Clerk's office for the Southern Division of the

*Page-number appearing at foot of page of original certified Transcript of Record.

Southern District of California, for the said defendant in error.

WILLIAM M. VAN DYKE,
Clerk United States District Court, Southern District of California.

By Chas. N. Williams,
Deputy Clerk. [6]

[Endorsed]: No. 413—Civil. In the United States District Court, in and for the Southern District of California, Southern Division. W. W. Skinner, Plaintiff, vs. The Sharples Separator Company, a Corporation, Defendant. Writ of Error. Filed Feb. 27, 1917. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. [7]

In the District Court of the United States, in and for the Southern District of California, Southern Division.

No. 413—CIVIL.

W. W. SKINNER,

Plaintiff,

vs.

THE SHARPLES SEPARATOR COMPANY, a
Corporation,

Defendant.

Citation.

United States of America,—ss.

The President of the United States, to the Above-named Plaintiff and to His Attorneys, GREETING:

You, and each of you, are hereby cited and admon-

ished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, in the State of California, within thirty (30) days from the date of this writ, pursuant to a writ of error filed in the Clerk's office of the above-named court, wherein said, The Sharples Separator Company, a corporation, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the final judgment in said writ of error mentioned, and from which said writ of error has been allowed, should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable EDWARD DOUGLAS WHITE, Chief Justice of the Supreme Court of the United States of [8] America, this 27th day of Feb., A. D. 1917, and of the independence of the United States, the 1—.

OSCAR A. TRIPPET,

Judge of the Above-entitled Court.

Attest: WILLIAM M. VAN DYKE,

Clerk of the Above-entitled Court.

Deputy Clerk.

Receipt of a copy of the foregoing Citation is hereby admitted this 28th day of Feb., A. D. 1917.

PHIL D. SWING,

Attorneys for Defendant in Error. [9]

[Endorsed]: No. 413—Civil. In the United States District Court, in and for the Southern District of California, Southern Division. W. W. Skinner, Plaintiff, vs. The Sharples Separator Company, a

Corporation, Defendant. Citation. Filed Mar. 1, 1917. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. [10]

Names and Addresses of Attorneys.

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San Francisco, California.

For Defendant in Error:

PHIL D. SWING, Esq., Suite 6, 7 and 8, Security Savings Bank Building, El Centro, California. [11]

*In the District Court of the United States, in and
for the Southern District of California, Southern
Division.*

No. 413—CIVIL.

W. W. SKINNER,

Plaintiff,

vs.

THE SHARPLES SEPARATOR COMPANY, a
Corporation, and EDGAR BROS. COMPANY, a Corporation,

Defendants. [12]

*In the Superior Court in and for the County of
Imperial, State of California.*

W. W. SKINNER,

Plaintiff,

vs.

THE SHARPLES SEPARATOR CO., a Corpora-
tion, and EDGAR BROS. COMPANY, a Cor-
poration,

Defendant.

ESHLEMAN & SWING, Attorneys for Plain-
tiff.

Summons.

The People of the State of California Send Greetings
To The Sharples Separator Company, a Corpo-
ration, and Edgar Bros. Company, a Corpora-
tion, Defendants:

YOU ARE HEREBY DIRECTED TO APPEAR
and answer the complaint in an action entitled as
above, brought against you in the Superior Court of
the County of Imperial, State of California, within
ten days after the service on you—of this summons—
if served within this county, or within thirty days if
served elsewhere.

And you are hereby notified that unless you appear
and answer as above required, the said plaintiff will
take judgment for any money or damages demanded
in the complaint, as arising upon contract, or he will
apply to the Court for any other relief demanded in
the complaint.

Given under my hand and the seal of the Superior

Court of the County of Imperial, State of California,
this 6th day of July, A. D. 1915.

[Seal]

M. S. COOK,
Clerk. [13]

*In the Superior Court of the State of California, in
and for the County of Imperial.*

W. W. SKINNER,

Plaintiff,

vs.

THE SHARPLES SEPARATOR COMPANY, a
Corporation, and EDGAR BROS. COM-
PANY, a Corporation,

Defendants.

Complaint.

Comes now the plaintiff above named and for cause
of action against the above-named defendants, al-
leges:

I.

The plaintiff is informed and believes and there-
fore alleges the fact to be that The Sharples Sepa-
rator Company is a corporation, organized and ex-
isting under and by virtue of the laws of the State of
Pennsylvania, and having its principal place of
business at West Chester, Pennsylvania. That
said The Sharples Separator Company has not filed
the certified copy of its articles of incorporation in
the office of the Secretary of the State of California,
nor designated a person residing within the State of
California, upon whom process, issued by authority
of or under the laws of the State of California, may

be served. That at all times herein mentioned said The Sharples Separator Company has been and now is engaged in the transaction of business within the State of California. That at all times herein mentioned said The Sharples Separator Company has been and now is engaged in the manufacture and sale of cream separators and mechanical milkers.

II.

That Edgar Bros. Company is a corporation *and* existing under and by virtue of the laws of the State of California, and having its principal place of business at the City of Imperial, [14] County of Imperial, State of California, and at all times herein mentioned has been and now is engaged in the sale of farm and dairy tools, implements and machinery, including the manufactured products of the said The Sharples Separator Company.

III.

The plaintiff at all times herein mentioned was a farmer and dairyman within the County of Imperial, State of California, and at all times herein mentioned has owned, cared for, and milked and now does own, care for, and milk a herd of dairy cows as defendants at all times herein mentioned well know.

IV.

That on or about the 3d day of January, 1914, at El Centro in the County of Imperial, State of California, and while plaintiff was the owner as aforesaid of a herd of dairy cows, consisting of about ninety (90) head, the defendants sold and delivered to the plaintiff a certain mechanical milker known as the SHARPLES MECHANICAL MILKER, consisting of four milker units and then and there war-

ranted the same to be in all respects fit and proper for the said use of milking plaintiff's said cows and especially warranted that when said SHARPLES MECHANICAL MILKER has been installed on plaintiff's ranch by defendants, it could safely be used for milking plaintiff's said cows, and that the use thereof in milking said cows would not in any way injure said cows nor decrease the amount of milk said cows would give if said mechanical milker was operated and cared for in accordance with defendant's instructions.

V.

That plaintiff had no information or knowledge regarding said mechanical milker or any mechanical milker, other than the representations and warranties of defendants and had no means to and was unable to ascertain the truth or falsity of defendant's said representations and warranties before making said purchase and [15] plaintiff believed the said representations of defendants and relied upon their said warranties and made said purchase solely by reason of said representations and warranties.

VI.

That on or about the 5th day of February, 1914, defendants installed said The Sharples Mechanical Milker for plaintiff on his ranch near El Centro, said County of Imperial, and declared to plaintiff that the said mechanical milker was then and there completely and properly installed and that he could thereafter safely use and operate it for milking plaintiff's said cows and that if operated and cared for in accordance with the defendants' instructions, the same would not in any way injure plaintiff's said

cows nor decrease the amount of milk said cows would give.

VII.

That thereafter plaintiff began in good faith to use the said mechanical milker for milking his said cows, and at all times operated and cared for said mechanical milker in strict conformity to and in compliance with all of defendants' instructions but said mechanical milker was not then and there nor has it since been nor is it now fit or proper to be used for milking plaintiff's said cows but the use thereof for milking plaintiff's said cows bruised and injured the teats, udders, and bag of many of plaintiff's said cows and greatly lessened the amount of milk given by all of said cows. That as soon as plaintiff discovered that the said milker was injuring his said cows, he discontinued the use thereof.

VIII.

That on or about the 20th day of May, 1914, plaintiff notified defendants that he had in good faith endeavored to use the said mechanical milker for the purpose of milking his said cows but that said milker was wholly insufficient for said purpose and that it did not in any respect comply with their warranties and offered to return the same. [16]

IX.

That defendants thereupon repeated all their former representations and warranties and asserted that the said mechanical milker had not been given a fair trial and insisted that defendants be permitted to operate the same upon plaintiff's cows and again represented the said mechanical milker properly operated would not in any way injure

plaintiff's said cows and on or about the 25 day of June, 1914, defendants, themselves, began to operate said mechanical milker in milking plaintiff's said cows on his ranch in Imperial County and continued to so operate it for a period of about two weeks thereafter, during which time said mechanical milker was under the defendant's sole care, custody and control. That defendants were wholly unable to operate said mechanical milker so as not to injure plaintiff's said cows but on the contrary, the said mechanical milker, while being operated by defendants as aforesaid in milking plaintiff's said cows, did greatly injure said cows and totally and permanently ruining many of them for any and all purposes whatever. That after their unsuccessful attempt to operate said milker, to wit, on or about the 7th day of July, 1914, defendants abandoned their said attempt to make said milker work.

X.

That after defendants discontinued operating said mechanical milker, as aforesaid, plaintiff did not again attempt to use the same but again notified defendants that the same was useless and worthless and offered to return the same to the defendants and demanded that defendants return to him the purchase price thereof and damages for the injury done his said cows by the operation of said milker as aforesaid.

XI.

That on or about the 20th day of October, 1914, defendants again asserted that that said mechanical milker was a fit and [17] proper machine for

milking plaintiff's cows and represented that said milker could be successfully operated without injury to plaintiff's cows and insisted that they be permitted another trial thereof upon plaintiff's said cows, and again represented and warranted that the said mechanical milker would not in any way injure plaintiff's said cows and agreed to pay plaintiff all damages caused his said cows by said mechanical milker. That plaintiff consented to another trial and on the 20th day of October, 1914, defendants again began the operation of said mechanical milker on plaintiff's cows and attempted to milk plaintiff's said cows therewith. That from the said 20th day of October, 1914, to the 18th day of December, 1914, defendants continued to operate said milker upon plaintiff's said cows and during all that period defendants had the sole care, custody, and control of said machine. That said mechanical milker while being operated as aforesaid by said defendants, greatly injured plaintiff's said cows by bruising and disceasing the teats, udders and bags of said cows and totally and permanently ruining many of said cows for dairy purposes and for all purposes whatever. That on the 18th day of December, 1914, defendants discontinued operating said milker and the same has not been used since.

XII.

That at all times herein mentioned said mechanical milker has been and now is wholly and entirely useless and worthless and of no value whatever. That on or about the 18th day of December, 1914, plaintiff after a full and fair trial of said milker as

aforesaid notified defendants of the insufficiency of the said milker to do the things which defendants had represented and warranted it could do and would do, and offered to return the said milker to the defendants and demanded that defendants return him the purchase price of said milker and also that defendants pay him for the damages and loss to his said cows. [18]

XIII.

That before said Sharples Mechanical Milker was used on plaintiff's said cows, they were a valuable herd of *heathly*, well bred dairy cows free from disease. That as a direct result of the efforts made in good faith to use the said mechanical milker as aforesaid, two (X) of his cows died from the injurious effects upon them of said milker to plaintiff's damage in the sum of Three Hundred (300) Dollars. Five (5) were totally and permanently ruined for all purposes to plaintiff's damage in the sum of Six Hundred Seventy-five (675) Dollars. Ten (10) were totally and permanently ruined for dairy purposes to plaintiff's damage in the sum of Seven Hundred and Thirty (730) Dollars. Ten (10) were injured, each by the loss of the use of one or more teats to plaintiff's damage in the sum of Three Hundred (300) Dollars, making plaintiff's total damage by reason of the injury to his said cows in the sum of Two Thousand and Five (2005) Dollars.

XIV.

That as a direct result of the efforts made in good faith to use the said mechanical milker as aforesaid, plaintiff has suffered a loss of butter fat re-

ceived from said cows, amounting to Six Thousand (6000) lbs. to his damage in the sum of Fifteen Hundred (1500) Dollars.

XV.

That plaintiff paid defendants in the purchase and installation of said mechanical milker the sum of One Thousand and Seven (1007) Dollars.

XVI.

That defendants have paid plaintiff no part of said sum of Forty-five Hundred Twelve (4512) Dollars but the *whoe* sum thereof is now due, owing and unpaid. [19]

WHEREFORE, plaintiff prays judgement against defendants for the sum of Forty-five Hundred Twelve and no/100 (4512) Dollars and for costs of suit incurred herein.

ESHLEMAN & SWING,

Attorneys for Plaintiff.

State of California,

County of Imperial,—ss.

W. W. Skinner, being duly sworn, deposes and says: That he is the plaintiff in the foregoing and above-entitled action, that he has heard read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters and things stated on his information and belief, and that as to those matters and things he believes it to be true.

W. W. SKINNER.

Subscribed and sworn to before me this 3d day of July, 1915.

PHIL D. SWING,
Notary Public in and for the County of Imperial,
State of California.

[Endorsed]: Filed July 6, 1915. M. S. Cook,
County Clerk. [20]

*In the Superior Court of the State of California, in
and for the County of Imperial.*

No. 2489.

W. W. SKINNER,

Plaintiff,

vs.

THE SHARPLES SEPARATOR COMPANY, a
Corporation, and EDGAR BROS. COM-
PANY, a Corporation,

Defendants.

**Petition for Removal to United States District
Court.**

To the Honorable the Superior Court of the State
of California, in and for the County of Im-
perial.

Now comes The Sharples Separator Company, a
corporation, one of the defendants in the above-en-
titled cause, and files this its petition for the re-
moval of said cause from the aforesaid Superior
Court, in which it is now pending, to the District
Court of the United States, in and for the Southern
District of California, held at the City of Los An-
geles, in said district and state.

Petitioner would show unto your Honorable Court:

1. That this cause was filed in your Honorable Court on the 6th day of July, 1915, and that the time to plead, answer or demur to the same has not expired under the laws of this State, in such cases made and provided.

2. That the suit is one of a civil nature at common law, of which the District Courts of the United States have original jurisdiction, to wit, said suit is brought to recover a sum in [21] excess of Three Thousand Dollars (\$3,000), exclusive of interest and costs.

3. That the controversy herein is separable and is between citizens of this state and of a foreign state; that the plaintiff was at the time of the commencement of this suit, and still is, a citizen of the State of California, residing in the County of Imperial, in said State; and that your petitioner The Sharples Separator Company, was, at the time of the commencement of this suit, and now is, a corporation organized under the laws of the State of Pennsylvania, with its principal place of business at West Chester, in said State; and that your petitioner desires to remove this suit into the District Court of the United States to be held in the Southern District of California, Southern Division.

4. Your petitioner further shows that the cause of action that the plaintiff has alleged in his complaint herein against the two defendants, your petitioner and Edgar Bros. Company, a corporation, is for damages arising from the sale and delivery to

plaintiff of a certain mechanical milker known as the "Sharples Mechanical Milker"; and that plaintiff alleges that the defendants warranted the same to be in all respects fit and proper for the use of milking cows and especially warranted that when said "Sharples Mechanical Milker" had been installed on plaintiff's ranch by defendants it could safely be used for milking plaintiff's cows, and that the use thereof in milking said cows would not in any way injure cows nor decrease the amount of milk said cows would give if said mechanical milker was operated and cared for in accordance with defendants' instructions; and that plaintiff alleges that defendants were unable to operate said mechanical milker so as not to injure [22] plaintiff's cows, but on the contrary, while the same was being operated by defendants plaintiff's cows were injured, and asks for judgment against defendants in the sum of Four Thousand Five Hundred Twelve Dollars (\$4512) and costs.

5. That the said "Sharples Mechanical Milker" referred to in the complaint was sold by your petitioner to the plaintiff and that Edgar Bros. Company, also joined as a defendant herein, was paid a commission for the sale of said machine and was acting at all times herein simply and solely as agent for your petitioner; and that the defendant Edgar Bros. Company is and was fraudulently and improperly joined as a party defendant for the sole purpose of defeating the right of petitioner to remove this cause to the United States District Court; and that said defendant is not in any way interested in

the controversy set forth in the complaint herein.

Your petitioner therefore prays that this Court proceed no further herein, except to make the order of removal as required by law and to accept the bond presented herewith, and direct a transcript of the record herein to be made for said Court as provided by law, and as in duty bound your petitioner will ever pray.

THE SHARPLES SEPARATOR COMPANY,
By WILLARD P. SMITH,
B. B. BLAKE,

Its Attorneys. [23]

State of California,

City and County of San Francisco,—ss.

F. A. Frank, being duly sworn, deposes and says:

That he is the managing agent of The Sharples Separator Company, the petitioner herein named, and has knowledge of the facts set forth in said petition; that he has read the above and foregoing petition and knows the contents thereof and that the same is true of his own knowledge, except as to the matters which are therein stated on information or belief and as to those matters he believes it to be true.

That the reason why this verification is not made by The Sharples Separator Company is that it is a Pennsylvania corporation and none of its officers are or reside in the State of California.

F. A. FRANK.

Subscribed and sworn to before me this 10th day of September, 1915.

[Seal]

J. D. BROWN,

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed September 13, 1915. M. S. Cook, County Clerk. [24]

*In the Superior Court of the State of California,
in and for Imperial County.*

#31694-15.

W. W. SKINNER,

Plaintiff,

vs.

THE SHARPLES SEPARATOR COMPANY, a
Corporation, and EDGAR BROS. COM-
PANY, a Corporation,

Defendants.

Bond on Removal.

KNOW ALL MEN BY THESE PRESENTS:
That the undersigned, Sharples Separator Co., a corporation, one of the defendants, as principal, and United States Fidelity & Guaranty Company, a corporation duly organized and existing and doing business under and by virtue of the laws of the State of Maryland, as surety, are held and firmly bound unto the plaintiff in the above-entitled cause, in the sum of Five Hundred Dollars, lawful money of the United States of America, for the payment of which sum, well and truly to be made, the undersigned bind

themselves, jointly and severally, firmly by these presents:

THE CONDITION of this obligation is such, that WHEREAS, Sharpless Separator Co., a corporation, one of the defendants as aforesaid, has applied by petition to the said Superior Court for the removal of the said action to the District Court of the United States for the Southern District of California, pursuant to the Act of Congress in such case made and provided;

NOW, THEREFORE, if said defendant shall enter in said District Court of the United States for the District aforesaid, within thirty days from date of the filing of the petition a certified copy of the record in said action, and shall pay all costs that may be awarded therein by said District Court if said court shall hold that said suit was wrongfully or improperly [25] removed thereof, then this obligation shall be void; otherwise shall be and remain in full force and effect.

THE SHARPLES SEPARATOR COMPANY,

By W. P. SMITH,

Attorney in Fact.

UNITED STATES FIDELITY & GUAR-
ANTY COMPANY,

(Corporate Seal)

H. V. D.

By BORLAND & JOHNS,

Attorneys in Fact.

By W. S. ALEXANDER.

State of California,

City and County of San Francisco,—ss.

On this 7th day of September, in the year one

thousand nine hundred and 15, before me, M. J. Cleveland, a notary public in and for the city and county of San Francisco, personally appeared H. V. D. Johns and W. S. Alexander known to me to be the persons whose names are subscribed to the within instrument as the attorneys in fact of the United States Fidelity and Guaranty Company, and acknowledged to me that they subscribed the name of the United States Fidelity and Guaranty Company thereto as principal, and their own names as attorneys in fact.

[Notarial Seal]

M. J. CLEVELAND,

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed September 13, 1915. M. S. Cook, County Clerk. [26]

In the Superior Court of the State of California, in and for the County of Imperial.

No. 2489.

W. W. SKINNER,

Plaintiff,

vs.

THE SHARPLES SEPARATOR COMPANY, a Corporation, and EDGAR BROS. COMPANY, a Corporation,

Defendants.

Notice of Petition and Bond for Order of Removal.
To the Plaintiff Above Named and to Messrs. Eshleman & Swing, his attorneys:

Please take notice that The Sharples Separator

Company, one of the defendants in the above-entitled cause, will on the 17th day of September, 1915, at ten o'clock A. M., or as soon thereafter as counsel can be heard, move the court for an order removing said cause to the District Court of the United States for the Southern District of California in accordance with the petition and bond of defendants, copies of which are hereto attached.

Dated September 10th, 1915.

WILLARD P. SMITH,
B. B. BLAKE,

Attorneys for Defendant The Sharples Separator Company.

[Endorsed]: Filed September 13, 1915. M. S. Cook, County Clerk. G. H. Mathews, Deputy Clerk.

Due service of the within notice of filing petition and receipt of a copy of petition and bond is hereby admitted this 13th day of September, 1915.

ESHLEMAN & SWING,
Attorneys for Plaintiff. [27]

*In the Superior Court of the State of California, in
and for the County of Imperial.*

No. 2489.

W. W. SKINNER,

Plaintiff,

vs.

THE SHARPLES SEPARATOR COMPANY, a
Corporation, and EDGAR BROS. COM-
PANY, a Corporation,

Defendants.

Order of Removal.

This cause coming on for hearing upon petition and bond of the defendant The Sharpless Separator Company for an order transferring this cause to the United States District Court for the Southern District of California, Southern Division, and it appearing to the Court that the defendant The Sharpless Separator Company has filed its petition for such removal in due form of law, and that the said defendant has filed its bond duly conditioned, with good and sufficient sureties, as provided by law, and that said defendant has given plaintiff due and legal notice thereof, and it appearing to the Court that this is a proper cause for removal to said District Court.

Now, therefore, said petition and bond are hereby accepted and it is hereby ordered and adjudged that this cause be and it hereby is removed to the United States District Court for the Southern District of California, Southern Division, and the clerk is hereby directed to make up the record in said cause for transmission to said court forthwith.

Done in open court, this 20th day of September, 1915.

FRANKLIN J. COLE,
Judge of the Superior Court.

[Endorsed]: Filed September 20, 1915. M. S. Cook, County Clerk. G. H. Matthews, Deputy.
[28]

Sep. 21, 1915,

Return of summons has not been made.

Clerk. [29]

*In the Superior Court of the State of California, in
and for the County of Imperial.*

No. 2489.

W. W. SKINNER,

Plaintiff,

vs.

THE SHARPLES SEPARATOR COMPANY, a
Corporation, and EDGAR BROS. COM-
PANY, a Corporation,

Defendants.

**Certificate of Clerk to Transcript on Removal from
Superior Court.**

State of California,
County of Imperial,—ss.

I, M. S. Cook, County Clerk of said county of Imperial, and ex-officio clerk of the Superior Court in and for said county, hereby certify the above and foregoing to be a full, true and correct copy of the record, and the whole thereof, in the above-entitled suit heretofore pending in said Superior Court, being the suit numbered No. 2489, wherein W. W. Skinner is plaintiff and The Sharpless Separator Company, a corporation, and Edgar Bros. Company, a corporation, are defendants, said record consisting of the complaint, filed by said plaintiff in said

suit on the 6th day of July, 1915; the summons and return thereon, filed in said suit on the — day of —, 1915, the petition for removal of said suit to the United States District Court, filed by the defendant The Sharples Separator Company in said suit on the 13th day of September, 1915, the bond for removal, the notice of petition and bond, and the order of removal of said suit to said United States District Court, entered of record in said suit on the 20th day of September, 1915, all as appears on the files and of record in my office.

Witness my hand and official seal this 21st day of September, A. D. 1915.

[Seal]

M. S. COOK,
County Clerk.

D. N. Thompson,
Deputy Clerk. [30]

[Endorsed]: No. 413—Civ. U. S. District Court, Southern District of California, Southern Division. W. W. Skinner v. The Sharples Separator Co. et al. Cert. Transcript on Removal from Superior Court Imperial Co. Filed Sep. 25, 1915. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. [31]

*In the District Court of the United States, for the
Southern District of California.*

No. —.

W. W. SKINNER,

Plaintiff,

vs.

THE SHARPLES SEPARATOR COMPANY, a
Corporation, and EDGAR BROS. COM-
PANY, a Corporation,

Defendants.

**Notice of Motion to Remand Cause to the Superior
Court of the State of California.**

To the Sharples Separator Company, a Corpora-
tion, Defendant Above Named, and to Willard
P. Smith and B. B. Blake, Its Attorneys:

You and each of you will please take notice that the plaintiff above named will on Monday the 18th day of October, 1915, at 10 o'clock A. M., or as soon thereafter as counsel can be heard, move the above-entitled court to remand the above-entitled cause to the Superior Court of the State of California in and for the county of Imperial. Said Motion will be made and based on the following grounds:

I.

That the said suit does not really or substantially involve a dispute or controversy properly within the jurisdiction of the said District Court.

II.

That it does not appear from the records and papers on file in the said District Court that there

is a controversy which is wholly between citizens or residents of different States which can be tried and which can wholly be determined between them without [32] involving necessarily a trial of the whole case as to all defendants.

III.

That the defendants are not all residents or citizens of States other than California and it does not appear that the parties defendant to said suit were or have been wrongfully joined as such.

IV.

That the defendant, the Edgar Bros. Company, is a proper and necessary party defendant and that said defendant, Edgar Bros. Company, is a resident of the State of California.

V.

That the controversy herein is not separable.

On the hearing of said motion plaintiff will rely on and read in evidence.

1. The transcript and record on file in said District Court in said cause.

2. The answer of the plaintiff to the petition of The Sharples Separator Company for a removal, served herewith.

3. Affidavit of W. W. Skinner.

Dated this 7th day of October, 1915.

ESHLEMAN & SWING,

Attorneys for Plaintiff.

[Endorsed]: 413—Civ. In the District Court of the United States for the Southern District of California. W. W. Skinner, Plaintiff, vs. The Sharples Separator Co., a Corporation, and Edgar

Bros., a Corporation, Defendants. Notice of Motion to Remand Cause to the Superior Court of the State of California. Recd. copy of the within notice this 11th day of Oct. 1915. Willard P. Smith, B. B. Blake, Atty. for Deft., The Sharples Separator Company. Filed Oct. 13, 1915. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. Eshleman & Swing, Attorneys for Plaintiff. [33]

*In the District Court of the United States, for the
Southern District of California.*

No. —.

W. W. SKINNER,

Plaintiff,

vs.

THE SHARPLES SEPARATOR COMPANY, a
Corporation, and EDGAR BROS. COM-
PANY, a Corporation,

Defendants.

Demurrer to Defendants' Petition for Removal.

Comes now the plaintiff above-named and demurs to defendant's The Sharples Separator Company's Petition for Removal on the ground that the same does not state facts sufficient to justify the removal of the same.

WHEREFORE plaintiff prays that said cause by remanded to the Superior Court of the State of California in and for the county of Imperial.

ESHLEMAN & SWING,
Attorneys for Plaintiff.

[Endorsed]: 413—Civ. In the District Court of the United States for the Southern District of California. W. W. Skinner, Plaintiff, vs. The Sharples Separator Company, a Corporation, and Edgar Bros. Company, a Corporation, Defendants. Demurrer to Defendant's Petition for Removal. Recd. copy of within Demurrer this 11th day of Oct. 1915. Willard P. Smith, B. B. Blake, Attorneys for Deft., The Sharples Separator Company. Filed Oct. 13, 1915. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. Eshleman & Swing, Attorneys for Plaintiff. [34]

*In the District Court of the United States, for the
Southern District of California.*

W. W. SKINNER,

Plaintiff,

vs.

THE SHARPLES SEPARATOR COMPANY, a
Corporation, and EDGAR BROS. COM-
PANY, a Corporation,

Defendants.

Answer to Petition for Removal.

Comes now W. W. Skinner, plaintiff above named, and for answer to the petition for removal denies, alleges, and admits as follows:

I.

Denies that the controversy herein is separable and alleges that the injury complained of was the result of the joint acts of both of said defendants and that the injury suffered by the plaintiff as the

result of the acts of defendant, Edgar Bros Company, a corporation, cannot be ascertained or estimated separately and apart from the injury suffered by plaintiff as the result of the acts of defendant, The Sharples Separator Company, a corporation.

II.

Denies that the Sharples Mechanical Milker referred to in plaintiff's complaint was sold to plaintiff by the petitioner herein, The Sharples Separator Company.

III.

That as to the allegations contained in paragraph 5 of said Petition that Edgar Bros. Company was paid a commission for the sale of said machines, plaintiff has no knowledge, information [35] or belief on the subject sufficient to enable him to answer the same and therefor denies that the Edgar Bros. Company was paid a commission for the sale of said machines.

IV.

Denies that Edgar Bros. Company was acting at all times herein simply and solely or simply or solely as an Agent for the petitioner, The Sharples Separator Company, a corporation.

V.

Denies that the defendant, Edgar Bros. Company, is and was or is or was fraudulently and improperly or fraudulently or improperly joined as a party defendant; denies that said Edgar Bros. Company was united as a party defendant for the sole purpose of defeating the right of petitioner to remove this cause to United States District Court but alleges that said

defendant Edgar Bros. Company is a necessary and proper party defendant.

VI.

Denies that said defendant, Edgar Bros. Company, is not in any way interested in the controversy set forth in the complaint herein but alleges that defendant, the Edgar Bros. Company, is interested in the controversy set forth in the complaint and is jointly liable with the defendant, The Sharples Separator Company, for the injury therein complained of.

WHEREFORE plaintiff prays that this Court proceed no further herein except to make an order remanding said cause to the Superior Court of the State of California in and for the county of Imperial and that petitioner will every pray.

ESHLEMAN & SWING,
Attorneys for Plaintiff.

State of California,
County of Imperial,—ss.

W. W. Skinner, being first duly sworn, deposes and says: That he is the plaintiff in the foregoing and above-entitled [36] action that he has read the foregoing answer to the petition for removal and knows the contents thereof, that the same is true of his own knowledge, except as to the matter and things therein stated on his information and belief and that as to those matters and things he believes it to be true.

W. W. SKINNER.

Subscribed and sworn to before me this 7th day of October, 1915.

[Seal]

PHIL D. SWING,
Notary Public in and for the County of Imperial,
State of California.

[Endorsed]: 413—Civ. In the District Court of the United States for the Southern District of California. W. W. Skinner, Plaintiff, vs. The Sharples Separator Co., a Corporation, and Edgar Bros. Company, a Corporation, Defendants. Answer to Petition for Removal. Recd. copy of within Answer this 11th day of Oct., 1915. Willard P. Smith, B. B. Blake, Attorney for Defendant, The Sharples Separator Company. Filed Oct. 13, 1915. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. Eshleman & Swing, Attorneys for Plaintiff. [37]

*In the District Court of the United States, Southern
District of California.*

No. —.

W. W. SKINNER,

Plaintiff,

vs.

THE SHARPLES SEPARATOR COMPANY, a
Corporation, and EDGAR BROS. COM-
PANY, a Corporation,

Defendants.

**Notice of Motion of Application for Leave to Amend
the Petition for Removal Herein.**

To W. W. Skinner, Plaintiff:

To Eshleman & Swing, His Attorneys:

You and each of you please take notice that the

defendant Sharples Separator Company above named, will, on Monday, the 25th day of October, 1915, at 10 o'clock A. M., or as soon thereafter as counsel can be heard, move the above-entitled Court for leave to amend the petition for removal from the Superior Court of Imperial County, to the United States District Court.

Said motion will be made and based upon the following grounds:

1. That the defendant herein was unable to secure the facts necessary to set forth in the petition for removal until on or about the 18th day of October, 1915.

2. That the amendment of said petition is necessary in order to set out more fully and distinctly the facts which support the grounds upon which the same is based, and that the record and petition show sufficient grounds for removal and the ultimate jurisdictional facts are correctly [38] although imperfectly stated in the original petition.

On the hearing of said motion this defendant will rely upon, and read in evidence, the proposed amended petition, a copy of which is herewith served upon you, and the affidavit of Willard P. Smith, verified October 18th, 1915, a copy of which is also herewith served upon you and the record herein.

Dated this 18th day of October, 1915.

WILLARD P. SMITH,
BERKELEY B. BLAKE,

Attorneys for Defendant Sharples Separator Company. [39]

*In the District Court of the United States, Southern
District of California.*

W. W. SKINNER,

Plaintiff,

vs.

THE SHARPLES SEPARATOR COMPANY, a
Corporation, and EDGAR BROS. COM-
PANY, a Corporation,

Defendants.

Affidavit of Willard P. Smith.

State of California,

County of Los Angeles,—ss.

Willard P. Smith, being duly sworn, deposes and says: I am one of the attorneys for the defendant The Sharples Separator Company, and have my office in the city and county of San Francisco, California. That a petition for removal from the Superior Court in the State of California to the United States District Court in this District, was filed in said court on or about the 13th day of September, 1915, and the said Superior Court made an order removing the said cause from said court to this court on the 20th day of September, 1915, and the record in said court was filed in this court September 25th, 1915.

That on the 11th day of October, 1915, a notice of motion to remand this cause to the Superior Court of the State of California, Imperial County, together with the papers accompanying the same, was served

upon affiant at the city and county of San Francisco. That affiant immediately wired and wrote the defendant Edgar Brothers Company for information needed to meet said allegations contained in the affidavits used upon this motion, and that affiant immediately took up the matter with the Sharples Separator Company officials in the city and county of San Francisco, [40] and learned that Mr. C. Ehret, secretary of the Sharples Separator Company, who resides at West Chester in the State of Pennsylvania, had been in San Francisco during the month of October prior to the 11th day of October, and that the said secretary had taken all of the papers from the office of the Sharples Separator Company and gone down to the Imperial Valley to look into the facts in connection with this suit, and affiant was unable to secure any information from the other defendant, Edgar Brothers Company, until the 18th day of October, 1915, when they forwarded to affiant at Los Angeles an affidavit made by J. H. Edgar, and was unable to get in touch with the said secretary, Mr. C. Ehret until the said date, the 18th day of October, 1915. That immediately upon getting the facts from Mr. Ehret and from the defendant Edgar Brothers Company, affiant drew the amended petition with the intention of serving the same upon the plaintiff's attorneys on the 18th day of October, 1915, so that this matter could be taken up at the next motion day, to wit, October 25th, 1915.

WILLARD P. SMITH,

Subscribed and sworn to before me this 18th day of October, 1915.

[Seal]

I. R. RUBIN,

Notary Public in and for the County of Los Angeles,
State of California.

[Endorsed]: No. 413. In the United States District Court, Southern District of California, Southern Division. W. W. Skinner, Plaintiff, vs. The Sharples Separator Company, a Corporation, et al., Defendants. Notice of Motion of Application for Leave to Amend the Petition for Removal Herein. Affidavit. Received copy of the within notice this 18th day of October, 1915. Eshleman & Swing, Attys. for Plaintiff. Filed Oct. 18, 1915. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. Willard P. Smith, 829 Citizens Nat'l Bank Bldg., Fifth & Spring Sts., Los Angeles, Cal., Telephones: A-2752, Main 5166, Attorneys for Sharples Separator Co. [41]

*In the District Court of the United States Southern
District of California.*

District Court No. —

W. W. SKINNER,

Plaintiff,

vs.

THE SHARPLES SEPARATOR COMPANY,
a Corporation, and EDGAR BROS. COM-
PANY, a Corporation,

Defendants.

*In the Superior Court of the State of California in
and for the County of Imperial.*

W. W. SKINNER,

Plaintiff,

vs.

THE SHARPLES SEPARATOR COMPANY, a
Corporation, and EDGAR BROS. COM-
PANY, a Corporation,

Defendants.

**Amended Petition for Removal to United States
District Court.**

To the Honorable the Superior Court of the State
of California in and for the County of Im-
perial:

Now comes The Sharples Separator Company, a
corporation, one of the defendants in the above-
entitled cause, and files this its petition for the re-
moval of said cause from the aforesaid Superior
Court, in which it is now pending, to the District
Court of the United States, in and for the South-
ern District of California, held at the City of Los
Angeles, in said District and State.

Petitioner would show unto your Honorable
Court:

1. That this cause was filed in your Honorable
[42] Court on the 6th day of July, 1915, and de-
fendant, The Sharples Separator Company was
served with summons and complaint August 31st,
1915, and that the time to plead, answer or demur
to the same has not expired under the laws of this
State, in such cases made and provided. And your

petitioner is informed, and verily believes, that no process and no summons or complaint has been served upon the other defendant herein.

2. That the suit is one of a civil nature at common law, of which the District Courts of the United States have original jurisdiction, to wit, said suit is brought to recover a sum in excess of Three Thousand Dollars (\$3,000), exclusive of interest and costs.

3. That the controversy herein between plaintiff and petitioner, is separable and is wholly between citizens of different states, and can be fully determined as between said parties. That the plaintiff was at the time of the commencement of this suit, and still is, a citizen of the State of California, residing in the county of Imperial, in said State; and that your petitioner, The Sharples Separator Company was, at the time of the commencement of this suit, and now is, a corporation organized under the laws of the State of Pennsylvania, with its principal place of business at West Chester, in said State; and a citizen of said State; and that your petitioner desires to remove this suit into the District Court of the United States to be held in the Southern District of California, Southern Division, and said controversy is between the plaintiff, a citizen of the State of California, and the defendant, The Sharples Separator Company, a citizen of the State of Pennsylvania, and the amount involved in said controversy was, and is now in excess of the sum of \$3,000, exclusive of interest and costs. [43]

4. Your petitioner further shows that the cause of action that plaintiff has alleged in his complaint

herein against the two defendants, your petitioner and Edgar Bros. Company, a corporation, is for damages arising from the sale and delivery to plaintiff of a certain mechanical milker, known as the "Sharples Mechanical Milker"; and that plaintiff alleges that the defendants on or about the 2d day of January, 1914, sold and delivered to plaintiff said mechanical milker, consisting of four milker units, and that defendants warranted the same to be in all respects fit and proper for the use of milking plaintiff's cows, and especially warranted that when said Sharples Mechanical Milker has been installed on plaintiff's ranch by defendants, it could safely be used for milking plaintiff's cows, and that the use thereof in milking said cows would not in any way injure said cows or decrease the amount of milk said cows would give, if said mechanical milker was operated and cared for in accordance with defendant's instructions; and plaintiff alleges that he, and also defendants, were unable to operate said mechanical milker so as not to injure plaintiff's cows, but on the contrary, while the same was being operated by plaintiff, and later by defendants, plaintiff's cows were injured, and asks for judgment against defendants in the sum of Four Thousand Five Hundred Twelve Dollars (\$4,512), exclusive of

Amended interest and costs.

Nov. 1,
1915. Per
Min. Ord.
Nov. 1,
1915. Leslie
S. Colyer,
Deputy
Clerk.

defendants

5. That said allegation that plaintiff sold and delivered on January 2d, 1914, four mechanical units is false and untrue, and the falsity of said allegation was known to plaintiff

at the time said complaint was drawn and verified, and that in truth and in fact, the Sharples Separator Company, this petitioner, or on about January 2d, 1914, sold and delivered to plaintiff a Sharples Mechanical Milker consisting of three units, and plaintiff used said [44] Mechanical Milker consisting of three units from the installation thereof on or about February 7th, 1914, to a time subsequent to May 6th, 1914, and prior to May 30th, 1914. That on or about May 6th, 1914, plaintiff purchased an additional unit of said Milker from the defendant Edgar Brothers Company, and operated said four units for about two weeks, until about May 30th, 1914, and alleges that he has not operated said four units since said 20th day of May, 1914. That said sale of January 2d, 1914, was made by said Sharples Separator Company, your petitioner, upon a written order, upon which was printed certain warranties in writing, which said order your petitioner desires to produce upon the hearing hereof, and your petitioner is informed, and verily believes, that the sale made to plaintiff by the defendant Edgar Brothers Company was made upon an oral contract between said defendant and plaintiff, and had no connection with the written order above alleged, and the said units were purchased by plaintiff at said different times, and under two separate and distinct contracts, one with the defendant Sharples Separator Company, and the other four months later under a contract with the other defendant, Edgar Brothers Company. That defendant Edgar Brothers Company became the

sales agent for defendant Sharples Separator Company on May 14th, 1914, and said defendant Edgar Brothers Company never at any time operated any of said milker units, and acted herein solely as agents for this defendant, in matters pertaining to said agency.

6. That the defendant Edgar Brothers Company is, and was fraudulently and improperly joined as a party defendant, for the sole purpose of defeating the right of this petitioner for removing this cause to the United States District Court, and plaintiff falsely and untruthfully alleged that all of [45] said units were sold by defendants, well knowing that said allegation was false in that he knew that petitioner is, and was in no way jointly obligated, and made no joint warranty, or no joint contract, with said Edgar Brothers Company or plaintiff; and that said defendant Edgar Brothers Company is not in any way interested in the said controversy, and that all matters in the controversy between the plaintiff and defendant Sharples Separator Company can be fully determined without the addition of defendant Edgar Brothers Company.

7. That plaintiff claims to have a writing signed by an employee of this defendant to the effect that if this defendant would allow a further trial of said milker it would pay any damages caused thereby to plaintiff's cows, and plaintiff does not claim that defendant Edgar Brothers Company was a party to such alleged arrangement, but said alleged arrangement is referred to in paragraph eleven of

plaintiff's complaint as having been made by defendants.

Your petitioner therefore prays that this Court proceed no further herein, except to make the order of removal as required by law and to accept the bond presented herewith, and direct a transcript of the record herein to be made for said Court as provided by law, and as in duty bound your petitioner will ever pray.

THE SHARPLES SEPARATOR COMPANY.

By WILLARD P. SMITH,
BERKELEY B. BLAKE,
Its Attorneys. [46]

State of California,

County of Los Angeles,—ss.

C. Ehret affirms and says: That he is the secretary of The Sharples Separator Company, the petitioner herein named, and has knowledge of the facts set forth in said petition; that he has read the above and foregoing petition and knows the contents thereof, and that the same is true of his knowledge, except as to the matters which are therein stated on information or belief, and as to those matters he believes it to be true.

CLEMENT EHRET.

Subscribed and affirmed before me this 18th day of October, 1915.

[Seal]

I. R. RUBIN,
Notary Public in and for the County of Los Angeles,
State of California.

[Endorsed]: Original. No. 413. In the United States District Court, Southern District of Califor-

nia, Southern Division. W. W. Skinner, Plaintiff, vs. The Sharpless Separator Company et al., Defendants. Amended Petition for Removal to United States District Court. Filed Oct. 18, 1915. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. Received copy of the within Amended Petition this 18th day of October, 1915. Eshleman & Swing, Attorneys for Plaintiff. Willard P. Smith, Berkeley B. Blake, Claus Spreckels Bldg., San Francisco, Attorneys for Petitioner. Telephones: A 2752; Main 5166. [47]

At a stated term, to wit, the July Term, A. D. 1915, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the courtroom thereof, in the city of Los Angeles, on Monday, the twenty-fifth day of October, in the year of our Lord one thousand nine hundred and fifteen. Present: The Honorable OSCAR A. TRIPPET, District Judge.

NO. 413—CIVIL S. D.

W. W. SKINNER,

Plaintiff,

vs.

THE SHARPLES SEPARATOR COMPANY,
et al.,

Defendants.

Minutes of Court—October 25, 1915—Order Allowing Application for Leave to Amend Petition for Removal, etc.

This cause coming on at this time to be further heard on defendants' application for leave to file an amended petition for the removal of said cause to this court, and also to be heard on demurrer to defendants' petition for said removal, and also to be heard on plaintiff's motion to remand said cause to the Superior Court of the State of California, in and for the county of Imperial; Phil D. Swing, Esq., appearing as counsel for plaintiff; Willard P. Smith, Esq., appearing as counsel for defendants; and said application for leave to amend petition having been further argued, in support thereof, by Willard P. Smith, Esq., of counsel for defendants, and in opposition thereto by Phil D. Swing, Esq., of counsel for plaintiff; it is ordered that said application for leave to amend said petition be, and the same hereby is, allowed and plaintiff having demurred to said amended petition for removal, it is ordered that said demurrer to amended petition for removal be, and the same hereby is, overruled; and the affidavit of W. W. Skinner having been filed on behalf of plaintiff; and plaintiff's motion to remand this cause to the Superior Court of the State of California, in and for the County of Imperial, having been argued, in support thereof, by Phil D. Swing, Esq., of counsel for plaintiff; it is, at the hour of 2:10 [48] o'clock P. M., ordered that this cause be, and the same hereby

is, continued until the hour of 4 o'clock P. M. of this day for further hearing.

[Endorsed]: No. 413—Civil. United States District Court, Southern District of California, Southern Division. W. W. Skinner, Plaintiff, vs. The Sharples Separator Company et al., Defendants. Copy of Order. Filed Oct. 19, 1916. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk.
[49]

At a stated term, to wit, the July Term, A. D. 1915, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the courtroom thereof, in the City of Los Angeles, on Monday, the first day of November, in the year of our Lord one thousand nine hundred and fifteen. Present: The Honorable OSCAR A. TRIPPET, District Judge.

NO. 413—CIVIL S. D.

W. W. SKINNER,

Plaintiff,

vs.

THE SHARPLES SEPARATOR COMPANY
et al.,

Defendants.

**Minutes of Court — November 1, 1915 — Order
Amending Petition for Removal, etc.**

This cause coming on this day to be further heard on plaintiff's motion to remand said cause to the Superior Court of the State of California, in and

for the County of Imperial; Phil D. Swing, Esq., appearing as counsel for plaintiff; Willard P. Smith, Esq., appearing as counsel for defendants; now, on motion of Willard P. Smith, Esq., of counsel for defendants, which motion is not opposed by counsel for plaintiff, it is ordered that the petition for removal herein be amended by striking out the word "plaintiff" in line 26 on page 3 thereof, and inserting in lieu thereof the word "defendants," said amendment to be made by the clerk and attested by him with a reference to this order; and said motion to remand having been argued, in opposition thereto, by Willard P. Smith, Esq., of Counsel for defendants; it is ordered that this cause be, and the same hereby is, continued for further hearing until the hour of 2 o'clock P. M., of this day. * * *

NO. 413—CIVIL S. D.

W. W. SKINNER,

Plaintiff,

vs.

THE SHARPLES SEPARATOR COMPANY
et al.,

Defendants. [50]

This cause coming on at this time to be further heard on plaintiff's motion to remand said cause to the Superior Court of the State of California, in and for the County of Imperial; Phil D. Swing, Esq., appearing as counsel for plaintiff, Willard P. Smith, Esq., appearing as counsel for defendants; and said motion to remand having been further argued, in opposition thereto, by Willard P. Smith, Esq., of

counsel for defendants, and in support thereof in reply by Phil D. Swing, Esq., of counsel for plaintiff; and this cause having been submitted to the Court for its consideration and decision on said motion to remand; it is by the Court ordered that plaintiff's motion to remand this cause to the Superior Court of the State of California in and for the County of Imperial be, and the same hereby is, denied.

[Endorsed]: No. 413—Civil. United States District Court, Southern District of California, Southern Division. *W. W. Skinner, Plaintiff, vs. Sharples Separator Company et al., Defendants.* Copy of Order. Filed Oct. 19, 1916. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk. [51]

In the United States District Court for the Southern District of California, Southern Division.

No. —.

W. W. SKINNER,

Plaintiff,

vs.

THE SHARPLES SEPARATOR COMPANY,
a Corporation, and EDGAR BROS. COMPANY,
a Corporation,

Defendants.

Answer of Edgar Bros. Company, a Corporation.

Now comes defendant Edgar Bros. Company, a corporation, by its attorneys McPherrin & Nichols, and for its separate answer to the complaint on file

herein admits, denies and alleges:

I.

Admits that said Edgar Bros. Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its principal place of business in Imperial, county of Imperial, State of California, and that at all times mentioned in the complaint was engaged in the sale of farm tools, implements, machinery and goods of a similar character.

Admits that it handles the goods of the Sharples Separator Company, but denies that at the time of any sale to plaintiff herein of a mechanical milker it handled, or was engaged in selling, the mechanical milker manufactured by the Sharples Separator Company.

II.

Admits that plaintiff was, and is, a farmer and dairyman within the county of Imperial, State of California, and that he was in possession of and milked a herd of dairy cows at the times mentioned in the said complaint. [52]

III.

Denies that this defendant on or about the 2d day of January, 1914, or at all, in said county of Imperial, or elsewhere, sold and delivered to the plaintiff a certain mechanical milker known as the Sharples Mechanical Milker; denies that it sold said plaintiff four milker units, known as the Sharples mechanical milker; denies that it warranted said milker units, or any milker units to be fit and proper for the use of milking plaintiff's cows, or any cows;

denies that it warranted four milker units or units to plaintiff at any time; denies that it stated, or warranted, to plaintiff that said Sharples mechanical milker could be safely used for milking plaintiff's cows when said milker was installed on plaintiff's ranch; denies that it installed said milker on plaintiff's ranch; denies that it warranted said milker, or any milker, would not injure plaintiff's cows; denies that it warranted that the amount of milk said cows would give would not decrease; denies that it warranted, in any manner, to plaintiff, said milker, or any part thereof, to any extent whatever.

IV.

This defendant further denies that it made any representations and warranties, or representations or warranties, to plaintiff before plaintiff made said purchase of a mechanical milker, upon which plaintiff could rely, or did rely; denies that it is responsible at all on any representations or warranties; denies that plaintiff believed any representations or warranties, or both, made by this defendant to plaintiff; denies that plaintiff received any information or knowledge from this defendant, either as representations or warranties, or both, except that this defendant may have delivered to plaintiff literature of said Sharples Separator Company, at the request of plaintiff. [53].

V.

Denies that on or about the 5th day of February, 1914, or at all, this defendant alone, or in conjunction with its codefendant, installed the Sharples mechanical milker, or any other milker, for plaintiff on his ranch near El Centro, Imperial county, or at

any other place; denies that it at that time, or at any other time, declared to plaintiff that said mechanical milker, or any milker, was then and there, or at any time, completely and properly installed; denies that it ever, at any time, made any statements relative to the condition of said milker after the same was set up or installed; denies that it declared to plaintiff that he could safely use and operate said mechanical milker after the same was installed for the purpose of milking his said cows; denies that it declared to plaintiff that if said milker was operated and cared for in accordance with defendant's instructions it would not injure plaintiff's said cows, nor decrease the amount of milk said cows would give; denies that it made any statement whatever to said plaintiff relative to the installation of a mechanical milker, or its safe use and operation, or the effect it would have on plaintiff's cows, or relative to the possible injury it might do plaintiff's cows, or relative to the decrease or lack of decrease in the amount of milk said cows would give.

VI.

This defendant further states that it has no information or belief upon the subject sufficient to enable it to answer the allegations of paragraph VII, of plaintiff's complaint, wherein plaintiff alleges that he, in good faith, began to use said mechanical milker for milking his said cows, and at all times operated and cared for said milker in strict conformity to and compliance with defendant's instruction; states that it has no [54] information or belief upon the subject sufficient to enable it to answer the allegation of

plaintiff that said mechanical milker was not then and there, nor has it since been, nor is it now, fit or proper to be used for milking the plaintiff's said cow; states that it has no information or belief upon the subject sufficient to enable it to answer the allegation of plaintiff that the use of said milker for milking plaintiff's cows bruised and injured the teats, udders and bag of many of plaintiff's said cows, and greatly lessened the amount of milk given by all of said cows; that it has no information or belief upon the subject sufficient to enable it to answer the allegations made by plaintiff that as soon as he discovered that the said milker was injuring his said cows he discontinued the use thereof; and placing its denial on said lack of information or belief above set out, denies all of said allegations, and especially the allegations set out in Paragraph VII, of plaintiff's complaint.

VII.

This defendant denies that on or about the 30th day of May, 1914, or any other time, plaintiff notified it that he had in good faith endeavored to use the said mechanical milker, for the purpose of milking his said cows, or for any other purpose; denies that plaintiff notified it that said milker was wholly insufficient for said purpose; denies that plaintiff notified it that said milker did not in any respect comply with warranties made by it, or its codefendant; denies that plaintiff offered to return said milker to this defendant.

VIII.

Denies that this defendant repeated any former representations and warranties; denies that it ever,

at any time, made any representations and warranties, or representations or [55] warranties relative to said mechanical milker; denies that it asserted to plaintiff that said mechanical milker had not been given a fair trial; denies that it insisted that defendants, or either of them, be permitted to operate the said milker upon plaintiff's cows; denies that it again represented, or ever represented, that the said mechanical milker properly operated would not in any way injure plaintiff's cows; denies that on or about the 25th day of June, 1914, or at all, this defendant either alone or in conjunction with its codefendant, began to operate said mechanical milker in milking plaintiff's said cows at his said ranch in Imperial county, or any place else; denies that it continued, either alone or in conjunction with its codefendant, to so operate said milker for a period of about two weeks thereafter; denies that it ever, at any time, either directly or indirectly, offered to operate, attempted to operate or did operate said mechanical milker for said plaintiff; denies that said mechanical milker was under this defendant's sole care, custody and control for said period of two weeks, or for any other time; denies that said mechanical milker was under this defendant's care or custody or control at any time for any period whatever; denies that said mechanical milker, while being operated by this defendant, or this defendant in conjunction with its codefendant, in milking plaintiff's cows did greatly injure said cows, and totally and permanently ruin many, or any, of said cows; denies that it had any connection whatever with any act, or performed any act, that injured or affected said cows; denies that it

ever attempted to operate said milker; denies that it, on or about the 7th day of July, 1914, or at any other time, abandoned its attempt to make said milker work. [56].

IX.

Defendant states that it has no information or belief upon the subject sufficient to enable it to answer the allegation of the complaint that plaintiff did not again attempt to use said mechanical milker, and placing its denial on said ground, denies the same; denies that plaintiff notified this defendant again, or at all, that said milker was useless and worthless, and offered to return the same to it; denies that plaintiff ever offered to return said milker to this defendant; denies that plaintiff demanded from this defendant that it return to him the purchase price of said milker; denies that he demanded of this defendant any damages for the injury done to his said cows by the operation of said milker.

X.

Defendant further denies that on or about the 20th day of October, 1914, this defendant asserted, or ever asserted, that said mechanical milker was a fit and proper machine for milking plaintiff's cows; always stated that it knew nothing about mechanical milkers whatever; denies that it represented at the date above mentioned, or at all, that said milker could be successfully operated without injury to plaintiff's cows; denies that it insisted that it, or that both defendants, be permitted another trial, or any trial, upon plaintiff's said cows; denies that it again represented and warranted, or ever represented or warranted, that said mechanical milker would not in any

way injure plaintiff's cows; denies that it agreed to pay plaintiff all damage, or any damage, caused plaintiff's cows by said mechanical milker.

Denies that plaintiff consented to this defendant that it might have another trial, or any trial, or said milker; denies that on the 20th day of October, 1914, or at any other time, this defendant, alone or in conjunction with its codefendant, began the operation of said mechanical milker on plaintiff's said cows [57]; and attempted to milk plaintiff's said cows therewith; denies that from the 20th day of October, 1914, to the 18th day of December, 1914, or at any other time, this defendant, either alone or in conjunction with its codefendant, operated said milker upon plaintiff's said cows; denies that during said time, or at any other time, this defendant, alone or with its codefendant, had the sole care, custody and control of said machine; denies that it had anything to do with said machine at said time, or at any other time; denies that said mechanical milker, while being operated by this defendant, or by this defendant in conjunction with its codefendant, greatly injured said cows, or any of them by bruising and diseasing the teats, udders and bags of said cows, or in any way injured said cows; denies that by reason thereof said cows were totally and permanently ruined for dairy purposes; denies that any of said cows were injured at all by the acts or omissions of this defendant; denies that on the 18th day of December, 1914, this defendant discontinued operating said milker; states that it has no information or belief sufficient to enable it to answer the allegation of plaintiff's complaint, wherein plaintiff states that

since the 18th day of December, 1914, said milker has not been used, and placing its denial on said ground, denies the same.

XI.

Denies that on or about the 18th day of December, 1914, or at any other time, plaintiff, after a full and fair trial of said milker, or at all, notified this defendant of the insufficiency of said milker to do the things which defendants had represented and warranted it would do; denies that plaintiff notified this defendant as to any representations or warranties made by it, and the breach thereof; denies that plaintiff offered to return the said milker to this defendant at any time; denies that plaintiff [58] demanded that this defendant return to him the purchase price of said milker; denies that plaintiff demanded that this defendant pay him for the damage and loss to his said cows.

XII.

Defendant further states that it has no information or belief upon the subject sufficient to enable it to answer the allegation of plaintiff's complaint wherein plaintiff alleges that before said Sharples' mechanical milker was used on his cows said cows were a valuable herd of healthy, well-bred, dairy cows, free from disease; that it has no information upon the subject sufficient to enable it to answer the allegation of said complaint that as a direct result of the efforts made in good faith to use the said mechanical milker as aforesaid two of said plaintiff's cows died from the injurious effects upon them of said milker, to plaintiff's damage in the sum of Three Hundred (\$300) Dollars; that five were totally and

permanently ruined for all purposes to plaintiff's damage in the sum of Six Hundred Seventy-five (\$675) Dollars; that ten were totally and permanently ruined for dairy purposes to plaintiff's damage in the sum of Seven Hundred Thirty (\$730) Dollars; that ten were injured, each by the loss of the use of one or more teats, to plaintiff's damage in the sum of Three Hundred (\$300) Dollars, making plaintiff's total damage Two Thousand Five (\$2,005) Dollars, and placing its denial on said ground, denies the same.

Defendant further states that it has no information and belief sufficient to enable it to answer any of the allegations in paragraph XIII of said plaintiff's complaint, and placing its denial on that ground, denies all of said allegations therein contained.

XIII.

Defendant further states that it has no information or [59] belief sufficient to enable it to answer the allegation in plaintiff's complaint that as a direct result of his efforts made in good faith to use said mechanical milker he has suffered a loss of butter fat to the value of One Thousand Five Hundred (\$1,500) Dollars, and placing its denial on said ground, denies the same.

This defendant further states that it has no information or belief sufficient to enable it to answer the allegation of plaintiff that the purchase and installation of said mechanical milker cost the sum of One Thousand Seven (\$1,007) Dollars, and placing its denial on said ground, denies the same.

This defendant denies that there is now due, owing

and unpaid, or due, or owing or unpaid, from this defendant to plaintiff, the sum of Four Thousand Five Hundred Twelve (\$4,512) Dollars, or any part thereof, or any sum whatever.

WHEREFORE, defendant asks that it may go hence with its costs herein expended.

Attorneys for Defendant.

State of California,
County of Imperial,—ss.

J. H. Edgar, being duly sworn, says: That he is the manager of plaintiff in the foregoing entitled matter; that he has read the foregoing answer and knows the contents thereof; that the same is true of his own knowledge, except as to matters which are therein stated on information or belief and as to those matters that he believes it to be true. That he is one of the elected officers of said corporation, and that he makes this affidavit for and in behalf of said corporation.

[Seal]

J. H. EDGAR.

Subscribed and sworn to before me this 1st day of November, A. D. 1915.

[Notarial Seal]

WM. O. HENDERKS,
Notary Public in and for the County of Imperial,
State of California. [60]

[Endorsed]: No. 413—Civ. U. S. Dis. Court, So. Dis. Calif., So. Div. W. W. Skinner, Plaintiff, vs. The Sharples Separator Company, a corporation, and Edgar Bros. Company, a Corporation, Defendants. Answer of Edgar Bros. Company, a Corporation. It is hereby agreed by plaintiff that defendant

Edgar Bros. Company may have until November 5th, 1915, in which to file this answer. Eshleman & Swing, Attorneys for Plaintiff. It is so ordered. Trippet, Judge. Received copy of the within answer this 1st day of Nov. 1915. Eshleman & Swing, Attorney for Pltff. Filed Nov. 5, 1915. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. McPherrin & Nichols, First National Bank Building, Imperial, Cal., Attorneys for Defendant. [61]

*In the United States District Court, for the Southern
District of California, Southern Division.*

W. W. SKINNER,

Plaintiff,

vs.

THE SHARPLES SEPARATOR COMPANY, a
Corporation, and EDGAR BROS. COM-
PANY, a Corporation,

Defendants.

Amended Complaint.

Comes now the plaintiff above named and by leave of Court first had and obtained filed this his amended complaint and for cause of action against the above named defendants, alleges:

I.

That plaintiff is informed and believes and therefore alleges the fact to be that The Sharples Separator Company is a corporation, organized and existing under and by virtue of the laws of the State of Pennsylvania and having its principal place of business at West Chester, Pennsylvania. That said The Shar-

ples Separator Company has not filed the certified copy of its Articles of Incorporation in the office of the Secretary of the State of California, nor designated a person residing within the State of California upon whom process issued by authority of or under the laws of the State of California may be served. That at all times herein mentioned said The Sharples Separator Company has been and now is engaged in the transaction of business within the state of California. That at all times herein mentioned said The Sharples Separator Company has been and now is engaged in the manufacture and sale of cream separators and mechanical milkers. [62]

II.

That Edgar Bros. Company is a corporation incorporated and existing under and by virtue of the laws of the State of California, and having its principal place of business at the city of Imperial, county of Imperial, State of California, and at all times herein mentioned has been and now is engaged in the sale of farm and dairy tools, implements, and machinery, including the manufactured products of the said The Sharples Separator Company.

III.

That plaintiff was at all times herein mentioned was a farmer and dairyman within the county of Imperial, State of California, and at all times herein mentioned has owned, cared for, and milked and now does own, care for, and milk a herd of dairy cows as defendants at all times herein mentioned well knew.

IV.

That on or about the 2d day of January, 1914, at

El Centro, in the county of Imperial, State of California, and while plaintiff was the owner, as aforesaid, of a herd of dairy cows, consisting of about ninety (90) head, the defendants sold to the plaintiff a certain mechanical milker known as the SHARPLES MECHANICAL MILKER, consisting of three milker units and then and there warranted the same to be in all respects fit and proper for the said use, of milking plaintiff's said cows and especially warranted that when said SHARPLES MECHANICAL MILKER had been installed on plaintiff's ranch by defendants, it could be safely used for milking plaintiff's said cows and that the use thereof in milking said cows would not in any way injure said cows nor decrease the amount of milk said cows would give if said mechanical milker was operated and cared for in accordance with defendant's instructions.

V.

That plaintiff had no information or knowledge regarding said mechanical milker or any mechanical milker, other than the representations [63] and warranties of defendants and had no means to and was unable to ascertain the truth or falsity of defendants' said representations and warranties before making said purchase and plaintiff believed the said representations of defendants and relied upon their said warranties and made said purchase solely by reason of said representations and warranties.

VI.

That on or about the 5th day of February, 1914, defendants installed said The Sharples Mechanical Milker for plaintiff on his ranch near El Centro,

said County of Imperial, and declared to plaintiff that the said mechanical milker was then and there completely and properly installed and that he could thereafter safely use and operate it for milking plaintiff's said cows and that if operated and cared for in accordance with defendant's instructions, the same would not in any way injure plaintiff's said cows nor decrease the amount of milk said cows would give.

VII.

That thereafter and before plaintiff had discovered that said mechanical milker was injuring his said cows, plaintiff purchased through defendant, Edgar Bros. Company, an additional unit of said Sharples Mechanical milker which unit, it was agreed by defendants, should be affixed to the Sharples Mechanical milker, already purchased by plaintiff and should be operated jointly with the other three units. That prior to the purchase of said unit, the same warranties and representations had been made to plaintiff regarding it as had been made to him regarding the said Sharples Mechanical Milker. That thereafter, to wit, about May 6, 1914, said fourth unit was delivered to plaintiff and was, in accordance with said previous understanding and agreement, affixed to the said Sharples Mechanical Milker and thereafter operated together with the other three units as one milker.

VIII.

That after the installation of said Sharples Mechanical [64] Milker, plaintiff began in good faith to use the said mechanical milker for milking

his said cows and at all times operated and cared for said mechanical milker in strict conformity to and in compliance with all of defendants' instructions but said mechanical milker was not then and there, nor has it since been, nor is it now, fit or proper to be used for milking plaintiff's said cows but the use thereof for milking plaintiff's said cows bruised and injured the teats, udders and bags of many of plaintiff's said cows and greatly lessened the amount of milk given by all of said cows. That as soon as plaintiff discovered that the said milker was injuring his said cows, he discontinued the use thereof on the cows showing injury from the use thereof.

IX.

That on or about the 30th day of May, 1914, plaintiff notified defendants that he had in good faith endeavored to use the said mechanical milker for the purpose of milking his said cows but that said milker was wholly insufficient for said purpose and that it did not in any respect comply with their warranties.

X.

That defendants thereupon repeated all their former representations and warranties and asserted that the said mechanical milker had not been given a fair trial and insisted that defendants be permitted to operate the same upon plaintiff's cows and again represented said mechanical milker properly operated would not in any way injure plaintiff's said cows and on or about the 25th day of June, 1914, defendants, themselves, began to operate said mechanical milker in milking plaintiff's said cows on

his ranch in Imperial County, and continued to so operate it for a period of about two weeks thereafter, during which time said mechanical milker was under the defendant's sole care, custody and control. That defendants were wholly unable to operate said mechanical milker so as not to injure plaintiff's said cows but on the contrary, the said mechanical milker, while being operated by defendants, as aforesaid, [65] in milking plaintiff's said cows, did greatly injure said cows and totally and permanently ruining many of them for any and all purposes whatever. That after their unsuccessful attempt to operate said milker, to wit, on or about the 7th of July, 1914, defendants, themselves, abandoned their said attempt to make said milker work.

XI.

That after defendants discontinued operating said mechanical milker, as aforesaid, plaintiff did not again attempt to use the same but again notified defendants that the same was useless and worthless and offered to return the same to the defendants and demanded that defendants return to him the purchase price thereof and damages for the injury done his said cows by the operation of said milker, as aforesaid.

XII.

That on or about the 20th day of October, 1914, defendants again asserted that that said mechanical milker was a fit and proper machine for milking plaintiff's cows and represented that said milker could be successfully operated without injury to plaintiff's cows and insisted that they be permitted

another trial thereof upon plaintiff's said cows, and again represented and warranted that the mechanical milker would not in any way injure plaintiff's said cows and agreed to pay plaintiff all damages caused his said cows by said mechanical milker. That plaintiff consented to another trial and on the 20th day of October, 1914, defendants again began the operation of said mechanical milker on plaintiff's cows and attempted to milk plaintiff's said cows therewith. That from the said 20th day of October, 1914, to the 18th day of December, 1914, defendants continued to operate said milker upon plaintiff's said cows and during all that period defendants had the sole care, custody and control of said machine. That said mechanical milker while being operated, as aforesaid, by said defendants, greatly [66] injured plaintiff's said cows by bruising and inflaming the teats, udders and bags of said cows and totally and permanently ruining many of said cows for dairy purposes and for all purposes whatever. That on the 18th day of December, 1914, defendants discontinued operating the said milker and the same has not been used since.

XIII.

That at all times herein mentioned said mechanical milker has been and now is wholly and entirely useless and worthless and of no value whatever. That on or about the 18th day of December, 1914, plaintiff notified defendants of the insufficiency of the said milker to do the things which defendants had represented and warranted it would and could do, and offered to return the said milker to the de-

fendants and demanded that defendants return him the purchase price of said milker and also that defendants pay him for the damages and loss to his said cows.

XIV.

That before said Sharples Mechanical Milker was used on plaintiff's said cows, as aforesaid, they were a valuable herd of healthy, well bred dairy cows free from disease. That as a direct result of the use of said mechanical milker by defendants for milking plaintiff's said cows, as aforesaid, two of his cows died from the injurious effects upon them by said mechanical milker, to plaintiff's damage in the sum of Three Hundred (\$300) Dollars; five (5) were totally and permanently ruined for all purposes, to plaintiff's damage in the sum of Six Hundred Seventy-five (\$675) Dollars; ten (10) were totally and permanently ruined for dairy purposes, to plaintiff's damage in the sum of Seven Hundred Thirty (\$730) Dollars; ten (10) were injured, each by the loss of the use of one or more teats, to plaintiff's damage in the sum of Three Hundred (\$300) Dollars, making plaintiff's total damage by reason of the injury from the use of said Sharples Mechanical Milker by defendants, as aforesaid, to his said cows the sum of Two Thousand Five (\$2,005) Dollars. [67]

XV.

That as a direct result of the use of the said mechanical milker, as aforesaid, plaintiff has suffered a loss of butter fat received from said cows, amounting to Six Thousand (6,000) pounds to his damage

in the sum of Fifteen Hundred (\$1500) Dollars.

XVI.

That plaintiff paid defendants in the purchase and installation of said mechanical milker the sum of One Thousand Seven (\$1,007) Dollars.

XVII.

That defendants have paid plaintiff no part of said sum of Forty-five Hundred Twelve (\$4512) Dollars but the whole sum thereof is now due, owing and unpaid.

WHEREFORE plaintiff prays judgment against defendants for the sum of Forty-five Hundred Twelve (\$4512) Dollars and for costs of suit incurred herein.

ESHLEMAN & SWING,
Attorneys for Plaintiff.

State of California,
County of Imperial,—ss.

W. W. Skinner, being duly sworn, deposes and says: That he is the plaintiff in the foregoing and above-entitled action, that he has heard read the foregoing amended complaint, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters and things therein stated on his information and belief, and that as to those matters and things he believes it to be true.

W. W. SKINNER.

Subscribed and sworn to before me this 15 day of January, 1916.

[Seal]

PHIL D. SWING,

Notary Public in and for the County of Imperial,
State of California. [68]

[Endorsed]: No. 413-Civ. U. S. District Court, S. D. State of California. W. W. Skinner, Plaintiff, vs. The Sharples Separator Co., and Edgar Bros. Company, a Corporation, Defendant. Amended Complaint. Received copy of the within Amended Complaint this 22 day of January, 1916. Willard P. Smith, B. B. Blake, Attorneys for Sharples Separator Co. Filed Feb. 2, 1916. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy. Eshleman & Swing, Suite 6, 7, and 8, Security Savings Bank Building, El Centro, California, Phone 150, Attorneys for Plaintiff. [69]

*In the District Court of the United States, for the
Southern District of California, Southern Division.*

No. 413—Civ.

W. W. SKINNER,

Plaintiff,

vs.

THE SHARPLES SEPARATOR COMPANY, a
Corporation, and EDGAR BROS. COMPANY,
a Corporation,

Defendants.

Answer of Defendant The Sharples Separator Company to Amended Complaint.

Now comes the Sharples Separator Company, a corporation, one of the defendants above named, and answering plaintiff's amended complaint on file herein, admits, alleges and denies as follows:

I.

Answering the allegations contained in paragraphs II, III, V, XIV and XV of said amended complaint, this defendant states that it has no information or belief upon the subject sufficient to enable it to answer the said allegations and, basing its denial upon that ground, denies each and every, all and singular, the allegations in said paragraphs contained.

II.

Answering the allegations contained in paragraph IV of said complaint, this defendant admits that on or about the 2nd day of January, 1914, it sold plaintiff under a contract in writing a certain Sharples mechanical milker consisting of three milker units, but denies that at said time, or at any [70] other time, at El Centro, in the County of Imperial, State of California, or at any other place, or at all, the defendants or this defendant then and there or then or there warranted the same to be in all or in any respects fit or proper for the use of milking plaintiff's cows, and denies that defendants or this defendant especially warranted that when said milker had been installed on plaintiff's ranch by defendants or by this defendant it could safely be used

for milking plaintiff's said cows, or that the use thereof in milking said cows would not in any way injure said cows or decrease the amount of milk said cows would give if said mechanical milker was operated or cared for in accordance with defendant's instructions.

III.

Answering the allegations contained in paragraph VI of said complaint, this defendant denies that on or about the 5th day of February, 1914, or at any other time, or at all, the defendants, or this defendant, declared to plaintiff that the said milkers were then and there, or then or there, completely and properly, or completely or properly, installed, or that he could thereafter use or operate them for milking his cows or that if operated or cared for in accordance with defendants' or this defendant's instructions the same would not in any way injure his cows, or decrease the amount of milk said cows would give.

IV.

Answering the allegations contained in paragraph VII of said complaint, this defendant denies that it was agreed by defendants that an additional unit of said Sharples milker should be operated jointly with said other three units, and denies that the same or any warranties or representations [71] were or had been made to plaintiff regarding said unit, as had been made to plaintiff regarding the said Sharples mechanical milker; and alleges that defendant has no knowledge or information upon the subject sufficient to enable it to answer as to when

the fourth unit was delivered to plaintiff, or whether or not the same was operated together with three units as one milker, and, basing its denial on that ground, denies each and every and all the said allegations; and denies that the said unit was affixed to said milker in accordance with any previous understanding and agreement, or understanding or agreement.

V.

Answering the allegations contained in paragraph VIII of said complaint, this defendant denies that plaintiff began to use or used the said mechanical milker for milking his cows, or operated or cared for said mechanical milker in strict or any conformity or in compliance with all or any of defendants', or of this defendant's, instructions and alleges that plaintiff failed to conform or comply in any way with the instructions of this defendant in the operation of said milker; and denies that said mechanical milker at any of the times mentioned in said paragraph VIII was not fit or proper to be used for milking plaintiff's cows, and alleges that it was at all times fit and proper for use in milking plaintiff's cows; and, except as above stated, this defendant states that it has no information or belief upon the subject sufficient to enable it to answer the allegations contained in said paragraph VIII, and, basing its denial upon that ground, denies each and every, all and singular, the allegations in said paragraph contained.

VI.

Answering the allegations contained in paragraph

X of [72] said complaint, this defendant denies that the defendants thereupon or at any time or at all repeated all or any representations or warranties alleged to have been made theretofore, and denies that they made any assertions in regard to any representations and warranties, and denies that they insisted that defendants or this defendant be permitted to operate the same, and denies that they represented in any way the said mechanical milker when properly operated would not in any way injure plaintiff's cows; denies that on or about the 25th day of June, 1914, or at any time, the defendants themselves, or this defendant, began to operate said milker for milking plaintiff's cows or continued to operate it for a period of about two weeks, or for any period thereafter, and denies that during any period of time said milker was under the defendants' of this defendant's sole care, custody and control, or sole care, custody or control, and denies that defendants were unable to operate said mechanical milker, so as not to injure plaintiff's cows; and denies that said milker while being operated by defendants or by this defendant in milking plaintiff's cows injured said cows or any of them, and denies that it totally or permanently or at all ruined any of them, for all or any purposes, and denies that defendants or this defendant made an unsuccessful or any attempt to operate said milker, or that on or about the 7th day of July, 1914, or at any other time, defendants or this defendant abandoned their attempt to make said milker work.

VII.

Answering the allegations contained in paragraph XI of said complaint, this defendant alleges that as to the allegations that after the time when defendants are alleged by plaintiff to have discontinued operating said mechanical milker, as [73] alleged in said complaint, plaintiff did not again attempt to use the same, this defendant has no information or belief upon the subject sufficient to enable it to answer, and, basing its answer upon said grounds, denies the said allegations.

VIII.

Answering the allegations contained in paragraph XII of said complaint, this defendant denies that on or about the 20th day of October, 1914, or at any other time, defendants or this defendant again or at all warranted that said mechanical milker was a fit and proper or fit or proper machine for milking plaintiff's cows, or represented the said milker could be successfully operated without injury to plaintiff's cows, or insisted that they or it be permitted another trial thereof upon plaintiff's said cows or again represented or warranted that the said mechanical milker would not in any way injure plaintiff's cows or agreed to pay plaintiff all or any damages caused his said cows by said mechanical milker; denies that plaintiff consented to another trial and on the 20th day of October, 1914, or on the 20th day of October, 1914, or at any other time, that defendants or this defendant again or at all began the operation of said mechanical milker on plaintiff's cows or attempted to milk plaintiff's said cows therewith; denies that

from the said 20th day of October, 1914, to the 18th day of December, 1914, or at any other time, defendants or this defendant continued to operate said milker upon plaintiff's said cows, or that during all that period or during any other period defendants or this defendant had the sole or any care, custody or control of said machine; alleges that as to whether during the period that said mechanical milker is alleged by plaintiff to have been operated by said defendants the said milker [74] greatly or at all injured plaintiff's said cows by bruising or diseasing the teats, udders or bags of said cows or totally or permanently or at all ruined many or any of said cows for dairy purposes or for any purposes whatever and as to whether on the 18th day of December, 1914, or at any other time, defendants or this defendant discontinued operating said milker, or whether the same has not been used since, this defendant has no information or belief upon the subject sufficient to enable it to answer the said allegations, and, basing its answer upon said ground, this defendant denies each and every, all and singular, of said allegations.

IX.

Answering the allegations contained in paragraph XIV of said complaint, this defendant alleges that as to whether before the use of said milker on plaintiff's said cows said cows were a valuable herd of healthy well bred dairy cows free from disease this defendant has no information or belief upon the subject sufficient to enable it to answer the said allegations, and, basing its answer upon that

ground, denies each and every, all and singular, the said allegations; denies that defendants made efforts in good faith to use the said mechanical milker as aforesaid, and denies that as a direct result of the efforts made to use the said mechanical milker two or any of plaintiff's cows died from the injurious effects of said milker or that five or any of said cows were totally or permanently ruined, and denies that ten or any of said cows were totally or permanently ruined for dairy or any other purposes, and denies that ten of said cows were injured as alleged in said paragraph, and denies that plaintiff has been damaged in the sum of two thousand five dollars as alleged in said paragraph [75] XIV, or in any other sum, or at all, and denies that any of plaintiff's cows were injured by reason of the use of said milker.

X.

Answering the allegations contained in paragraph XVI of said complaint, this defendant denies that plaintiff paid defendants or this defendant in the purchase and installation or in the purchase or installation of said mechanical milker the sum of one thousand seven dollars.

XI.

Answering the allegations contained in paragraph XVII of said complaint, this defendant denies that the sum of four thousand five hundred twelve dollars, or any other sum, is now due, owing or unpaid from defendants or from this defendant to plaintiff.

By way of a further and affirmative defense to plaintiff's amended complaint on file herein, and to

each and every of the allegations thereof, this defendant alleges:

I.

That prior to the commencement of this action defendant agreed to sell to plaintiff and plaintiff agreed to buy from defendant a Sharples milker equipment consisting of a pump and three units installed complete less transportation charges on outfit, power, belting, countershafting, etc., not included in said equipment; that it was further agreed by and between plaintiff and defendant that said sale was made with the understanding that the plaintiff would have the machine operated and cared for in accordance with defendant's instructions; that the machine would be kept in good order mechanically; that pressure [76] and vacuum would be maintained in accordance with defendant's instructions; that the cows would be carefully and thoroughly stripped after each milking and that the machine would be thoroughly cleaned after each milking and that all reasonable precautions tending to the production of clean milk would be observed.

II.

That thereafter defendant furnished plaintiff with instructions for the operation of said machines; that plaintiff failed to clean said machines after each milking and said plaintiff failed to observe reasonable precautions tending to the production of clean milk, and that plaintiff maintained and kept the said dairy, barn and premises in an unclean and unsanitary condition, and that if any injuries were inflicted upon the plaintiff's cows as

alleged in plaintiff's complaint, said injuries were the result of the unclean and unsanitary condition of said barn and of said premises, and of the failure of said plaintiff to take reasonable precautions for keeping said premises in a proper and sanitary condition.

III.

That it was further agreed by and between plaintiff and defendant that defendant would replace any parts of said Sharples milker equipment found to be defective in workmanship or material, provided written notice thereof was sent to this defendant by the purchaser and said defective part was returned within one year from the date of said purchase; but that said defendant would not replace any parts found to be defective as a result of ordinary wear and tear, accidents, or abuse; that plaintiff failed to send defendant written notice of any defects in said machine due to workmanship or materials and that if any [77] damages arose from the use of said machine said damages were caused by the abuse of said machine by plaintiff.

WHEREFORE, defendant The Sharples Separator Company having fully answered, prays that plaintiff take nothing by his said amended complaint, and that it have judgment herein for its costs.

WILLARD P. SMITH,
B. B. BLAKE,

Attorneys for Defendant The Sharples Separator Company.

State of California,

City and County of San Francisco,—ss.

C. Ehret affirms, deposes and says:

That he is an officer, to wit, the secretary of The Sharples Separator Company, one of the defendants named in the above-entitled action; that he has read the foregoing answer of the said defendant to the amended complaint of plaintiff and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters and things therein stated on information or belief, and that as to those matters and things he believes it to be true.

CLEMENT EHRET.

Subscribed and affirmed to before me this 12th day of February, 1916.

[Seal]

E. J. CASEY,

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: No. Civ. 413. In the District Court of the United States, for the Southern District of California, Southern Division. W. W. Skinner, Plaintiff, vs. The Sharples Separator Company et al., Defendants. Answer of Defendant the Sharples Separator Company to Amended Complaint. Filed Feb. 14, 1916. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. Willard P. Smith, Berkeley B. Blake, Attorneys for Defendant, 1601-9 Claus Spreckels Bldg., San Francisco, Cal.

[78]

*In the United States District Court for the Southern
District of California, Southern Division.*

No. —.

W. W. SKINNER,

Plaintiff,

vs.

THE SHARPLES SEPARATOR COMPANY, a
Corporation, and EDGAR BROS. COM-
PANY, a Corporation,

Defendants.

**Amended Answer of Edgar Bros. Company, a
Corporation.**

Now comes defendant Edgar Bros. Company, a corporation, by its attorneys McPherrin & Nichols, and for its separate amended answer to the amended complaint on file herein, admits, denies and alleges:

I.

Admits that said Edgar Bros. Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its principal place of business in Imperial, county of Imperial, State of California, and that at all times mentioned in the complaint was engaged in the sale of farm tools, implements, machinery and goods of a similar character.

Admits that it handled the goods of the Sharples Separator Company, but denies that at the time of any sale to plaintiff herein of a mechanical milker it handled, or was engaged in selling, the mechanical

milker manufactured by the Sharples Separator Company.

II.

Admits that plaintiff was, and is, a farmer and dairyman within the county of Imperial, State of California, and that he was in possession of and *mailed* a herd of dairy cows at the times mentioned in the said complaint. [79]

III.

Denies that this defendant on or about the 2d day of January, or at all, in said county of Imperial, or elsewhere, sold and delivered to the plaintiff a certain mechanical milker known as the Sharples mechanical miler; denies that it sold said plaintiff three milker units, known as the Sharples mechanical milker; denies that it warranted said milker units, or any milker units to be fit and proper for the use of milking plaintiff's cows, or any cows; denies that it warranted three milker units, or any units, to plaintiff at any time; denies that it stated, or warranted, to plaintiff that said Sharples mechanical milker could be safely used for milking plaintiff's cows when said milker was installed on plaintiff's ranch; denies that it installed said milker on plaintiff's rance; denies that it warranted said milker, or any milker, would not injure plaintiff's cows; denies that it warranted that the amount of milk said cows would give would not decrease; denies that it waranted, in any manner, to plaintiff said milker, or any part thereof, to any extent whatever.

IV.

This defendant further denies that it made any

representations and warranties, or representations or warranties, to plaintiff before plaintiff made said purchase of a mechanical milker, upon which plaintiff could rely, or did rely; denies that it is responsible at all on any representations or warranties; denies that plaintiff believed any representations or warranties, or both, made by this defendant to plaintiff; denies that plaintiff received any information or knowledge from this defendant, either as representations or warranties, or both, except that this defendant may have delivered to plaintiff literature of said Sharples Separator Company, at the request of plaintiff. [80]

V.

Denies that on or about the 5th day of February, 1914, or at all, this defendant alone, or in conjunction with its codefendant, installed the Sharples mechanical milker, or any other milker, for plaintiff on his ranch near El Centro, Imperial county, or at any other place; denies that it at that time, or at any other time, declared to plaintiff that said mechanical milker, or any milker, was then and there, or at any time, completely and properly installed; denies that it ever, at any time, made any statements relative to the condition of said milker after the same was set up or installed; denies that it declared to plaintiff that he could safely use and operate said mechanical milker after the same was installed for the purpose of milking his said cows; denies that it declared to plaintiff that if said milker was operated and cared for in accordance with defendant's instructions it would not injure plaintiff's

said cows, nor decrease the amount of milk said cows would give; denies that it made any statement whatever to said plaintiff relative to the installation of a mechanical milker, or its safe use and operation, or the effect it would have on plaintiff's cows, or relative to the possible injury it might do plaintiff's cows, or relative to the decrease or lack of decrease in the amount of milk said cows would give.

VI.

Denies that the plaintiff, after the installation of said mechanical milker, and subsequent to the 5th day of February, 1914, purchased from this defendant an additional unit of said Sharples mechanical milker; denies that it sold said additional unit to said plaintiff; denies that it agreed that said additional unit should be affixed to any unit or units theretofore purchased by said plaintiff, and denies that it agreed that said additional unit should be operated jointly with [81] any unit or units theretofore purchased by said plaintiff; denies that it warranted said milker unit in any manner, or to any extent; denies that it made any representations to the plaintiff respecting said milker unit; denies that it delivered said additional milker unit to the plaintiff herein, in accordance with any previous understanding or agreement, or at all; denies that it affixed said additional milker unit to said Sharples mechanical milker, or installed the same in any manner.

VII.

This defendant further states that it has no information or belief upon the subject sufficient to

enable it to answer the allegations of Paragraph VIII, of plaintiff's amended complaint, wherein plaintiff alleges that he, in good faith, began to use said mechanical milker for milking his said cows, and at all times operated and cared for said milker in strict conformity to and in compliance with defendant's instructions; states that it has no information or belief upon the subject sufficient to enable it to answer the allegation of plaintiff that said mechanical milker was not then and there, nor has it since been, nor is it now, fit or proper to be used for milking the plaintiff's said cows; states that it has no information or belief upon the subject sufficient to enable it to answer the allegation of plaintiff that the use of said milker for milking plaintiff's cows bruised and injured the teats, udders and bag of many of plaintiff's said cows, and greatly lessened the amount of milk given by all of said cows; that it has no information or belief upon the subject sufficient to enable it to answer the allegation made by plaintiff that as soon as he discovered that the said milker was injuring his said cows he discontinued the use thereof; and placing its denial on said lack of information or belief above set out, denies all of said allegations, and especially the allegations set out in Paragraph VIII, of plaintiff's amended complaint. [82]

VIII.

This defendant denies that on or about the 30th day of May, 1914, or any other time, plaintiff notified it that he had in good faith endeavored to use the said mechanical milker for the purpose of milking

his said cows, or for any other purpose; denies that plaintiff notified it that said milker was wholly insufficient for said purpose; denies that plaintiff notified it that said milker did not in any respect comply with warranties made by it, or its codefendant; denies that plaintiff offered to return said milker to this defendant.

IX.

Denies that this defendant repeated any former representations and warranties; denies that it ever, at any time, made any representations and warranties; denies that it ever, at any time, made any representations and warranties, or representations or warranties relative to said mechanical milker; denies that it asserted to plaintiff that said mechanical milker had not been given a fair trial; denies that it insisted that defendants, or either of them, be permitted to operate the said milker upon plaintiff's cows; denies that it again represented, or ever represented, that the said mechanical milker properly operated would not in any way injure plaintiff's cows; denies that on or about the 25th day of June, 1914, or at all, this defendant, either alone or in conjunction with its codefendant, began to operate said mechanical milker in milking plaintiff's said cows at his said ranch in Imperial county, or any place else; denies that it continued, either alone or in conjunction with its codefendant, to so operate said milker for a period of about two weeks thereafter; denies that it ever, at any time, either directly or indirectly, offered to operate, attempted to operate or did operate said mechanical milker for said plain-

tiff; denies that said mechanical milker was under this defendant's sole care, custody and control for said period of two weeks, or for [83] any other time; denies that said mechanical milker was under this defendant's care or custody or control at any time for any period whatever; denies that said mechanical milker, while being operated by this defendant, or this defendant in conjunction with its codefendant, in milking plaintiff's cows did greatly injure said cows, and totally and permanently ruin many, or any of said cows; denies that it had any connection whatever with any act, or performed any act, that injured or affected said cow; denies that it ever attempted to operate said milker; denies that it, on or about the 7th day of July, 1914, or at any other time, abandoned its attempt to make said milker work.

X.

Defendant states that it has no information or belief upon the subject sufficient to enable it to answer the allegation of the complaint that plaintiff did not again attempt to use said mechanical milker, and placing its denial on said ground, denies the same; denies that plaintiff notified this defendant again, or at all, that said milker was useless and worthless, and offered to return the same to it; denies that plaintiff ever offered to return said milker to this defendant; denies that plaintiff demanded from this defendant that it return to him the purchase price of said milker; denies that he demanded of this defendant any damages for the

injury done to his said cows by the operation of said milker.

XI.

Defendant further denies that on or about the 20th day of October, 1914, this defendant asserted, or ever asserted, that said mechanical milker was a fit and proper machine for milking plaintiff's cows; always stated that it knew nothing about mechanical milkers whatever; denies that it represented at the date above mentioned, or at all, that said milker could be successfully operated without injury to plaintiff's cows; denies that it insisted that it, or that both defendants, be permitted another [84] trial, or any trial, upon plaintiff's said cows; denies that it again represented and warranted, or ever represented or warranted that the said mechanical milker would not in any way injure plaintiff's cows; denies that it agreed to pay plaintiff all damage, or any damage, caused plaintiff's cows by said mechanical milker.

Denies that plaintiff consented to this defendant that it might have another trial, or any trial, of said milker; denies that on the 20th day of October, 1914, or at any other time, this defendant, alone, or in conjunction with its codefendant, began the operation of said mechanical milker of plaintiff's said cows and attempted to milk plaintiff's said cows therewith; denies that from the 20th day of October, 1914, to the 18th day of December, 1914, or at any other time, this defendant, either alone or in conjunction with its codefendant, operated said milker upon plaintiff's said cows; denies that during said time,

or at any other time, this defendant, alone or with its codefendant, had the sole care, custody and control of said machine; denies that it had anything to do with said machine at said time, or at any other time; denies that said mechanical milker, while being operated by this defendant, or by this defendant in conjunction with its codefendant, greatly injured said cows, or any of them, by bruising and diseasing the teats, udders and bags of said cows, or in any way injured said cows; denies that by reason thereof said cows were totally and permanently ruined for dairy purposes; denies that any of said cows were injured at all by the acts or omissions of this defendant; denies that on the 18th day of December, 1914, this defendant discontinued operating said milker; states that it has no information or belief sufficient to enable it to answer the allegation of plaintiff's complaint, wherein plaintiff states that since the 18th day of December, 1914, said milker has not been used, and placing its denial on said ground, denies the same. [85]

XII.

Denies that on or about the 18th day of December, 1914, or at any other time, plaintiff, after a full and fair trial of said milker, or at all, notified this defendant of the insufficiency of said milker to do the things which defendant had represented and warranted it would do; denies that plaintiff notified this defendant as to any representations or warranties made by it, and the breach thereof; denies that plaintiff offered to return the said milker to this defendant at any time; denies that plaintiff demanded

that this defendant return to him the purchase price of said milker; denies that plaintiff demanded that this defendant pay him for the damage and loss to his said cows.

XIII.

Defendant further states that it has no information or belief upon the subject sufficient to enable it to answer the allegation of plaintiff's amended complaint wherein plaintiff alleges that before said Sharples' mechanical milker was used on his cows said cows were a valuable herd of healthy, well-bred, dairy cows, free from disease; that it has no information upon the subject sufficient to enable it to answer the allegation of said complaint that as a direct result of the efforts made in good faith to use the said mechanical milker as aforesaid two of said plaintiff's cows died from the injurious effects upon them of said milker, to plaintiff's damage in the sum of Three Hundred (\$300) Dollars; that five were totally and permanently ruined for all purposes to plaintiff's damage in the sum of Six Hundred Seventy-five (\$675) Dollars; that ten were totally and permanently ruined for dairy purposes to plaintiff's damage in the sum of Seven Hundred Thirty (\$730) Dollars; that ten were injured, each by the loss of the use of one or more teats, to plaintiff's damage in the sum of Three Hundred (\$300) Dollars, making plaintiff's total damage Two Thousand Five (\$2,005) Dollars, and placing its denial on [86] said ground, denies the same.

Defendant further states that it has no information and belief sufficient to enable it to answer any

of the allegations in paragraph XIV of said plaintiff's amended complaint, and placing its denial on that ground, denies all of said allegations therein contained.

XIV.

Defendant further states that it has no information or belief sufficient to enable it to answer the allegation in plaintiff's complaint that as a direct result of his efforts made in good faith to use said mechanical milker he has suffered a loss of butter fat to the value of One Thousand Five Hundred (\$1,500) Dollars, and placing its denial on said ground, denies the same.

This defendant further states that it has no information or belief sufficient to enable it to answer the allegation of plaintiff that the purchase and installation of said mechanical milker cost the sum of One Thousand Seven (\$1,007) Dollars, and placing its denial on said ground, denies the same.

This defendant denies that there is now due, owing and unpaid, or due, or owing or unpaid, from this defendant, to plaintiff, the sum of Four Thousand Five Hundred Twelve (\$4,512) Dollars, or any part thereof, or any sum whatever.

WHEREFORE, defendant asks that it may go hence with its costs herein expended.

McPHERRIN & NICHOLS,

Attorneys for Defendant Edgar Bros. Company. [87]

State of California,

County of Imperial,—ss.

J. H. Edgar, being duly sworn, says: That he is the manager of the defendant Edgar Bros. Company,

in the foregoing entitled matter; that he has read the foregoing Amended Answer and knows the contents thereof; that the same is true of his own knowledge, except as to matters which are therein stated on information or belief and as to those matters that he believes it to be true.

[Seal]

J. H. EDGAR.

Subscribed and sworn to before me this day of Mar. 4, 1916, A. D. 1916.

[Notarial Seal]

WM. O. HINDERKS,

Notary Public in and for the County of Imperial,
State of California.

[Endorsed]: No. 413-Civil. In the United States District Court, for the Southern District of Cal., County of Imperial, State of California, Southern Division. W. W. Skinner, Plaintiff, vs. The Sharples Separator Company, a Corporation, et al., Defendant. Amended Answer of Edgar Bros. Company, a Corporation. Received copy of the within Amended Answer this 7th day of March, 1916, Eshleman & Swing, Phil D. Swing, Attorney for Plaintiff. Filed Mar. 9, 1916. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. McPherrin & Nichols, First National Bank Building, Imperial, Cal., Attorneys for Defendant. [88]

*In the United States District Court, for the Southern
District of California, Southern Division.*

W. W. SKINNER,

Plaintiff,

vs.

THE SHARPLES SEPARATOR COMPANY, a
Corporation, and EDGAR BROS. COM-
PANY, a Corporation.

Defendants.

Amendment to Amended Complaint.

Comes now plaintiff above named and by leave of Court first had and obtained, filed this an amendment to his amended complaint, adding two paragraphs thereto, and alleges as follows:

XIV¹/₂.

That of plaintiff's said cows so injured by the operation of the said mechanical milker on them as aforesaid, plaintiff was obliged to pasture eight head thereof for a period of twelve (12) months before he could get them in condition so that he could sell or dispose of them at all to his damage in the sum of \$132; and six head of said cows plaintiff was obliged to pasture for a period of twenty-four months in order to get them into condition so that he could sell or dispose of them, to plaintiff's damage in the sum of \$288.

XVI¹/₂.

That the reasonable value of said mechanical milker so sold to plaintiff as aforesaid was nothing whatsoever. That said mechanical milker, if it had

complied with the warranty given to plaintiff at the time of the purchase thereof, would have been of the reasonable value of One Thousand Dollars (\$1,000).
[89]

WHEREFORE plaintiff prays judgment against defendant for the amount stated in the prayer of his amended complaint.

PHIL D. SWING,
Attorney for Plaintiff.

State of California,
County of Los Angeles,—ss.

W. W. Skinner, being first duly sworn, says: That he is the plaintiff in the foregoing entitled matter, that he has read the foregoing amendment to the amended complaint and knows the contents thereof; that the same is true of his own knowledge, except as to matters which are therein stated on information and belief and as to those matters he believes it to be true.

W. W. SKINNER.

Subscribed and sworn to before me this 10th day of October, 1916.

[Seal] WM. M. VAN DYKE,
Clerk U. S. District Court, Southern District of California.

By Chas. N. Williams,
Deputy.

[Endorsed]: No. Civ. 413. In the District Court of the United States, for the Southern District of California. W. W. Skinner, Plaintiff, vs. The Sharples Separator Company et al., Defendants.

Amendment to Amended Complaint. Recd. Copy, W. P. Smith & Bicksler, Smith & Parke, Attys. for Deft. Sharples Separator Co. Edgar Bros. Co. McPherrin & Nichols, Its Attys. Filed October 10th, 1916. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Phil D. Swing, Attorney for Plaintiff. [90]

At a stated term, to wit, the July Term, A. D. 1916, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the courtroom thereof, in the city of Los Angeles, on Tuesday, the tenth day of October, in the year of our Lord one thousand nine hundred and sixteen. Present: The Honorable OSCAR A. TRIPPET, District Judge.

No. 413—CIVIL, S. D.

W. W. SKINNER,

Plaintiff,

vs.

THE SHARPLES SEPARATOR COMPANY,
Defendant.

**Minutes of Court—October 10, 1916—Order
Continuing Cause.**

This cause having now, at the hour of 3:37 o'clock P. M., been again called for further trial before the court and a jury heretofore duly impanelled herein; Phil D. Swing, Esq., appearing as counsel for plaintiff; E. E. Nichols, Esq., appearing as counsel for defendant, Edgar Brothers Company; Willard P.

Smith, Esq., and Dale H. Parke, Esq., appearing as counsel for defendant Sharples Separator Company; A. S. Custer being present as shorthand reporter of the testimony and proceedings, and acting as such; and counsel for the respective parties having stipulated that the jury are present, and all of said jurors being present in court; and W. W. Skinner, the plaintiff, as a witness in his own behalf, having again taken the stand for further examination, and having given his testimony; and Albert Skinner having been called and sworn as a witness on behalf of plaintiff, and having given his testimony; and, in connection with the testimony of said witness, plaintiff having offered a metal sign, which is admitted in evidence as Plffs. Ex. 6; and Ida Skinner having been called and sworn as a witness on behalf of plaintiff, and having given her testimony and plaintiff having rested; and defendant Edgar Brothers, a [91] corporation, having, through E. E. Nichols, Esq., its counsel, demurred to the proof offered by plaintiff, and moved for an order dismissing this cause as to said defendant; and the Court having given the jury the usual admonition; and the jury thereupon, at the hour of 4:37 o'clock P. M., having been excused until Wednesday, the 11th day of October, 1916, at 10 o'clock A. M., and a statement having been made by Phil D. Swing, Esq., of counsel for plaintiff; it is ordered that said motion to dismiss this cause as to defendant Edgar Brothers, a corporation, be, and the same hereby is granted; and Dale H. Parke, Esq., of counsel for defendant Sharples Separator Company, having moved for a nonsuit herein, it is ordered

that said motion for a nonsuit be, and the same hereby is overruled; and plaintiff having asked leave to introduce and read herein a deposition on behalf of plaintiff, upon which request no ruling is now announced by the court; it is ordered that this cause be, and the same hereby is continued until Wednesday, October 11th, 1916, at 10 o'clock A. M., for further trial.

[Endorsed]: No. 413 Civil, S. D. United States District Court, Southern District of California, Southern Division. W. W. Skinner, Plaintiff, vs. The Sharples Separator Company, Defendant. Copy of Order. Filed Oct. 19, 1916. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk. [92]

*In the District Court of the United States, in and for
the Southern District of California, Southern
Division.*

No. 413—CIVIL.

W. W. SKINNER,

Plaintiff,

vs.

THE SHARPLES SEPARATOR COMPANY,
Defendant.

Verdict.

We, the jury in the above-entitled cause, find in favor of the plaintiff, in the sum of Thirty-seven Hundred and Sixty-three Dollars and Ninety-two Cents.

Los Angeles, October 13th, 1916.

L. T. BRADFORD,

Foreman.

[Endorsed]: No. 413—Civil. U. S. District Court, Southern District of California. W. W. Skinner vs. The Sharples Separator Co. Verdict. Filed Oct. 13, 1916. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. [93]

UNITED STATES OF AMERICA.

District Court of the United States, Southern District of California, Southern Division.

No. 413—CIVIL.

W. W. SKINNER,

Plaintiff,

vs.

THE SHARPLES SEPARATOR COMPANY, a Corporation, and EDGAR BROTHERS COMPANY, a Corporation.

Defendants.

Judgment.

This cause coming on regularly for trial on the 10th day of October, 1916, being a day in the July Term, A. D. 1916, of the District Court of the United States for the Southern District of California, Southern Division, before the Court and a jury of twelve (12) men duly impanelled; Phil D. Swing, Esq., appearing as counsel for plaintiff; E. E. Nichols, Esq., appearing as counsel for defendant, Edgar Brothers Company; Willard P. Smith, Esq., and Dale H. Parke, Esq., appearing as counsel for defendant, Sharples Separator Company; and the trial having been proceeded with on the 10th, 11th and 13th days of October, 1916, and witnesses having been

sworn and examined, and documentary evidence having been introduced on behalf of the respective parties; and the Court having, on the 11th day of October, 1916, upon motion of counsel for defendant, Edgar Brothers Company, ordered that this cause be dismissed as to said defendant, and the taking of evidence having been proceeded with, and the evidence having been closed; after argument by counsel for the respective parties and the instructions of the Court, having, on said 13th day of October, 1916, been submitted to the jury, and the jury, on said 13th day of October, 1916, having rendered the following verdict: [94]

“In the District Court of the United States, in and for the Southern District of California, Southern Division.

No. 413—CIVIL.

W. W. SKINNER,

Plaintiff,

vs.

THE SHARPLES SEPARATOR COMPANY,
Defendant.

We, the jury in the above-entitled cause, find in favor of the plaintiff, in the sum of Thirty-seven Hundred and Sixty-three Dollars and Ninety-two Cents.

Los Angeles, October 13th, 1916.

L. T. BRADFORD,
Foreman.”

—and the Court having ordered that judgment be entered herein in accordance with said verdict in favor of the plaintiff;

NOW, THEREFORE, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court, that the plaintiff, W. W. Skinner, do have and recover of and from the defendant, The Sharples Separator Company, a corporation, the sum of Thirty-seven Hundred and Sixty-three Dollars and Ninety-two Cents (\$3,763.92), together with plaintiff's costs in this action, taxed at \$266.04.

Judgment entered October 13, 1916.

WM. M. VAN DYKE,
Clerk.

By Chas. N. Williams,
Deputy Clerk.

[Endorsed]: No. 413—Civil. United States District Court, Southern District of California, Southern Division. W. W. Skinner, Plaintiff, vs. The Sharples Separator Company, a Corporation, and Edgar Brothers Company, a Corporation, Defendants. Copy of Judgment. Filed Oct. 19, 1916. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk. [95]

*In the District Court of the United States, in and for
the Southern District of California, Southern
Division.*

No. 413—CIVIL.

W. W. SKINNER,

Plaintiff,

vs.

THE SHARPLES SEPARATOR COMPANY, a
Corporation, and EDGAR BROTHERS
COMPANY, a Corporation,

Defendants.

**Certificate of Clerk U. S. District Court to
Judgment-roll.**

I, Wm. M. Van Dyke, clerk of the District Court of the United States for the Southern District of California, do hereby certify the foregoing to be a full, true and correct copy of an original Judgment entered in the above-entitled action and recorded in Judgment Book No. 2, at page 380 thereof, for the Southern Division; and I do further certify that the papers hereto annexed, constitute the judgment-roll in said action.

ATTEST my hand and the seal of said District Court, this 19th day of October, A. D. 1916.

[Seal]

WM. M. VAN DYKE,

Clerk.

By Leslie S. Colyer,

Deputy Clerk.

[Endorsed]: No. 413—Civil. In the District Court of the United States for the Southern District of

California, Southern Division. W. W. Skinner vs. The Sharples Separator Co. et al. Judgment-roll. Filed Oct. 19, 1916. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk. Recorded Judg. Reg. Book No. 2, page 380. [96]

*In the District Court of the United States, Southern
District of California, Southern Division.*

No. 413—CIVIL.

W. W. SKINNER,

Plaintiff,

vs.

THE SHARPLES SEPARATOR COMPANY, a
Corporation,

Defendant.

**Stipulation Extending Time for Preparing and
Filing Bill of Exceptions.**

IT IS HEREBY STIPULATED by and between the plaintiff and the defendant, through their respective attorneys, that the time within which the defendant, The Sharples Separator Company, may prepare, file and serve its bill of exceptions in the above-entitled action, to be used in support of a writ of error or appeal or for any other lawful purpose, be and is hereby extended and enlarged until and including Tuesday, December 5th, 1916.

Dated October 18th, 1916.

PHIL D. SWING,
Attorney for Plaintiff.

WILLARD P. SMITH, and
BICKSLER, SMITH & PARKE,
Attorneys for Defendant, The Sharples Separator
Company.

[Endorsed]: Original. No. Civil—413. In the United States District Court, in and for the Southern District of California, Southern Division. W. W. Skinner, Plaintiff, vs. The Sharples Separator Co., a Corporation, Defendant. Stipulation Extending Time for Preparing and Filing Bill of Exceptions. Filed Oct. 21, 1916. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Bicksler, Smith & Parke, 829 Citizens Natl. Bank [97] Bldg., Fifth & Spring Sts., Los Angeles, Cal. Telephones: A—2752; Main 5166, Attorneys for Defendant. [98]

*In the District Court of the United States, Southern
District of California, Southern Division.*

NO. CIVIL—413.

W. W. SKINNER,

Plaintiff,

vs.

THE SHARPLES SEPARATOR COMPANY, a
Corporation,

Defendant.

**Order Enlarging Time Within Which Bill of
Exceptions may be Filed.**

IT APPEARING that the parties hereto have, through their respective attorneys, by stipulation duly filed in this court, stipulated and agreed that the time within which the defendant, The Sharples Separator Company, may prepare, serve and file its bill of exceptions may be extended to and including the 5th day of December, 1916;

NOW, THEREFORE, upon application of the defendant, and pursuant to said stipulation, it is hereby ordered that the time within which the defendant The Sharples Separator Company may prepare, serve, and file its bill of exceptions, to be used in support of a writ of error, appeal, or other lawful purpose in this action, be and the same is hereby enlarged and extended to and including the 5th day of December, 1916.

Dated October 21st, 1916.

OSCAR A. TRIPPET,
District Judge. [99]

[Endorsed]: Original. No. Civil—413. In the United States District Court, in and for the Southern District of California, Southern Division. *W. W. Skinner*, Plaintiff, *vs. The Sharples Separator Co., a Corporation*, Defendant. Order Enlarging Time Within Which Bill of Exceptions may be Filed. Filed Oct. 21, 1916. *Wm. M. Van Dyke*, Clerk. By *Chas. N. Williams*, Deputy Clerk. *Bicksler, Smith & Parke*, 829 Citizens Natl. Bank Bldg., Fifth and

Spring Sts., Los Angeles, Cal., Telephones: A-2652,
Main 5166, Attorneys for Defendant. [100]

*In the District Court of the United States, Southern
District of California, Southern Division.*

NO. CIVIL—413.

W. W. SKINNER,

Plaintiff,

vs.

THE SHARPLES SEPARATOR COMPANY, a
Corporation,

Defendant.

**Stipulation Extending Time for Preparing and Fil-
ing Bill of Exceptions and Granting Stay of
Execution.**

IT IS HEREBY STIPULATED by and between the plaintiff and the defendant, through their respective attorneys, that the time within which the defendant The Sharples Separator Company, may prepare, file and serve its bill of exceptions in the above-entitled action, to be used in support of a writ of error or appeal or for any other lawful purpose, be and is hereby extended and enlarged until and including Friday, December 15th, 1916.

IT IS FURTHER STIPULATED THAT a further stay of execution to and including said 15th day of December, 1916, may be granted.

Dated November 20, 1916.

PHIL D. SWING,
Attorney for Plaintiff.

WILLARD P. SMITH,
BICKSLER, SMITH & PARKE,
Attorneys for Defendant, The Sharples Separator
Company.

It is so ordered.

TRIPPET,
District Judge. [101]

[Endorsed]: Original. No. Civil—413. In the United States District Court, in and for the Southern District of California, Southern Division. W. W. Skinner, Plaintiff, vs. The Sharples Separator Co., a Corporation. Stipulation Extending Time for Preparing and Filing Bill of Exceptions, and Granting Stay of Execution. Filed Nov. 20, 1916. Wm. M. Van Dyke, Clerk. By Geo. W. Fenimore, Deputy. Bicksler, Smith & Parke, 829 Citizens Natl. Bank Bldg., Fifth and Spring Sts., Los Angeles, Cal., Telephones: A-2752, Main 5166, Attorneys for Defendant. [102]

*In the District Court of the United States, Southern
District of California, Southern Division.*

NO. CIVIL—413.

W. W. SKINNER,

Plaintiff, *et al.*

vs.

THE SHARPLES SEPARATOR COMPANY, a
Corporation,

Defendant.

Stipulation Extending Time for Preparing and Filing Bill of Exceptions and Granting Stay of Execution.

IT IS HEREBY STIPULATED by and between the plaintiff and defendant, through their respective attorneys, that the time within which the defendant The Sharples Separator Company may prepare, file and serve its bill of exceptions in the above-entitled action, to be used in support of a writ of error or appeal, or for any other lawful purpose, be, and is hereby extended and enlarged until and including Saturday, December 23d, 1916.

IT IS FURTHER STIPULATED that a further stay of execution to and including said 26th day of December, 1916, may be granted.

Dated December 6, 1916.

PHIL D. SWING,
Attorney for Plaintiff.

WILLARD P. SMITH,
BICKSLER, SMITH & PARKE,
Attorneys for Defendant, The Sharples Separator Company.

It is so ordered. 12/23/16.

TRIPPET,
District Judge. [103]

[Endorsed]: Original. No. Civil—413. In the United States District Court, in and for the Southern District of California, Southern Division. W. W. Skinner, Plaintiff, vs. The Sharples Separator Company, a Corporation, Defendant. Stipulation Extending Time for Preparing and Filing Bill of Ex-

ceptions and Granting Stay of Execution. Filed Dec. 23, 1916. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk. Bicksler, Smith & Parke, 829 Citizens Natl. Bank Bldg., Fifth and Spring Sts., Los Angeles, Cal., Telephones: A-2752, Main 5166, Attorneys for Defendant. [104]

*In the District Court of the United States, Southern
District of California, Southern Division.*

NO. CIVIL—413.

W. W. SKINNER,

Plaintiff,

vs.

THE SHARPLES SEPARATOR COMPANY, a
Corporation,

Defendant.

**Stipulation Extending Time for Preparing and Fil-
ing Bill of Exceptions and Granting Stay of
Execution.**

IT IS HEREBY STIPULATED by and between the plaintiff and the defendant, through their respective attorneys that the time within which the plaintiff, W. W. Skinner, may prepare, file and serve his proposed amendments to defendant's proposed bill of exceptions in the above-entitled action, be and *he* is hereby extended and enlarged until and including Wednesday, January 31st, 1917.

IT IS FURTHER STIPULATED that a further stay of execution to and including the said 15th day of February, 1917, may be granted.

Dated December 20th, 1916.

PHIL D. SWING,
Attorney for Plaintiff.

WILLARD P. SMITH,
BICKSLER, SMITH & PARKE,
Attorneys for Defendant, The Sharples Separator
Company.

It is so ordered.

TRIPPET,
District Judge. [105]

[Endorsed]: 413—Civil. In the District Court of the United States, Southern District of California, Southern Division. W. W. Skinner, Plaintiff, vs. The Sharples Separator Company, a Corporation. Stipulation Extending Time for Preparing and Filing Bill of Exceptions and Granting Stay of Execution. Filed Jan. 26, 1917. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk. Phil D. Swing, Attorney for Plaintiff. [106]

At a stated term, to wit, the January Term, A. D. 1917, of the District Court of the United States, in and for the Southern District of California, Southern Division, held at the courtroom thereof, in the city of Los Angeles, on Friday, the 26th day of January, in the year of our Lord one thousand nine hundred and seventeen. Present: The Honorable OSCAR A. TRIPPET, District Judge.

NO. 413—CIVIL S. D.

W. W. SKINNER,

Plaintiff,

vs.

SHARPLES SEPARATOR COMPANY et al.,

Defendants.

**Minutes of Court — January 26, 1917 — Order
Extending Time to File Bill of Exceptions.**

On motion of Dale H. Parke, Esq., of counsel for defendants, it is ordered that said defendants be, and they hereby are, granted five (5) days after the filing of proposed amendments to the proposed bill of exceptions herein within which to present said bill of exceptions and amendments for settlement. [107]

At a stated term, to wit, the January Term, A. D. 1917, of the District Court of the United States, in and for the Southern District of California, Southern Division, held at the courtroom thereof, in the city of Los Angeles, on Tuesday, the 6th day of February, in the year of our Lord one thousand nine hundred and seventeen: Present: The Honorable OSCAR A. TRIPPET, District Judge.

No. 413—CIVIL S. D.

W. W. SKINNER,

Plaintiff,

vs.

SHARPLES SEPARATOR COMPANY et al.,

Defendants.

Minutes of Court—February 6, 1917—Order Extending Time to File Bill of Exceptions.

On motion of Dale H. Parke, Esq., of counsel for defendants, Phil D. Swing, Esq., of counsel for plaintiff being present and objecting thereto, it is ordered that the time of defendants to present the bill of exceptions herein for settlement be extended, and that the same be, and hereby is set down for settlement for Saturday, the 10th day of February, 1917, at 10 o'clock A. M. [108]

In the District Court of the United States, in and for the Southern District of California, Southern Division.

W. W. SKINNER,

Plaintiff,

vs.

THE SHARPLES SEPERATOR CO., et al.,

Defendants.

Objections to Presentation, Settlement and Signing of Bill of Exceptions.

Comes now plaintiff W. W. Skinner, at the time fixed for the presentation of the above bill to the Judge for settlement and signing but before the same is presented, settled or signed, to wit, on the 6th day of February, 1917, and duly enters his objection to the presentation, settlement and signing of the same on the ground that the bill of exceptions was not presented to the judge for settlement and signing, nor

was the same settled and signed within the term of court at which the trial was had and judgment rendered and entered, nor was there any stipulation of the parties or order of the Court made within said term extending the time for the presentation, settlement and signing of said bill of exceptions after the expiration of said term and that the only order made extending defendant's time for presenting, settling, and signing said bill was made after the expiration of said term, to wit, on the 26th day of January, 1917, to the making of which said order plaintiff never consented.

Dated February 6, 1917.

PHIL D. SWING,
Attorney for Plaintiff. [109]

[Endorsed]: 413-Civil. In the *Superior* Court of the United States in and for the Southern District of California, Southern Division. W. W. Skinner, Plaintiff, vs. The Sharples Separator Co., et al., Defendants. Objections to Presentation, Settlement and Signing of Bill of Exceptions. Recd. Copy of Within Objections this 6th Day of Feby. 1917. Willard P. Smith, Bicksler, Smith & Parke, Attorneys for Defendant, The Sharples Separator Co. Filed Feb. 6, 1917. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk. Phil. D. Swing, Attorney for Plaintiff. [110]

*In the District Court of the United States, Southern
District of California, Southern Division.*

No. 413.—CIVIL.

W. W. SKINNER,

Plaintiff,

vs.

THE SHARPLES SEPARATOR CO., a Corpora-
tion, and EDGAR BROS. CO., a Corporation,
Defendants.

Bill of Exceptions.

BE IT REMEMBERED: That the above-entitled action came on regularly for trial on Tuesday, October 10, 1916, at 10 o'clock A. M. of that day, before Hon. Oscar A. Trippet, Judge sitting in *and* above-entitled Court, with a jury, the above-named plaintiff being represented by Phil. D. Swing, Esq., of El Centro, California, and the above-named defendant, The Sharples Separator Co., a corporation, by Messrs. Willard P. Smith, of San Francisco, California, and Dale H. Parke, of Bicksler, Smith & Parke, of Los Angeles, California, and the defendant Edgar Bros., Co., a corporation, by Messrs. McPherrin & Nichols, of El Centro, California, and the following proceedings, and none other, were had, and the following evidence, and none other, was received. A jury was duly impaneled and sworn to try said cause, and thereupon an opening statement of said cause was made to said jury by counsel for plaintiff. [111]

Testimony of W. W. Skinner, in His Own Behalf.

Thereupon W. W. SKINNER, the plaintiff in said action, was called as a witness in his own behalf, and after having been first duly sworn, testified as follows:

Direct Examination.

My name is W. W. Skinner. I live at El Centro, Imperial Valley, California, where I have lived something over five years. I am engaged at present in dairying and ranching; I have been in that business in Imperial County something over five years. At the beginning of the year 1914, I was milking three strings of dairy cows—approximately anywhere from 85 to 100 cows; usually we constitute 30 cows a string; sometimes it will run two or three cows over and sometimes a little less—we were milking approximately 90 cows at that time. I had a selected herd of cattle that I had been selecting for since 1911, I began on that herd and I had been cutting out the poor milkers until I had built up an extra good herd of cattle.

About the first of the year 1914, I had negotiations looking towards the purchase of a mechanical milker, at my home, three miles east and north of El Centro; these negotiations were opened by one Mr. Hickson on behalf of The Sharples Separator Company people. Up to that time, I did not know anything about the Sharples Separator Company, or about any mechanical milker. Their sales agent delivered to me certain printed literature published by The Sharples

(Testimony of W. W. Skinner.)

Separator Company, which I read and believed and acted on; I bought a milking machine. [112]

Q. I will ask you to examine this printed matter, and ask if you are able to identify that?

(Handing witness paper hereinafter referred to as Plaintiff's Exhibit 2.)

A. Yes; he had here some things that I recognize; some of these things possibly I would not recognize, but there are some things here that I do. In reading his stuff, the thing that attracted my attention most were the things that would be of most help. I was looking, figuring on buying a machine, and the things that would be of the most importance to me attracted my attention most. This printed matter, or one substantially like it, was presented to me by Mr. Hicksen during the negotiations for the purchase of The Sharples Mechanical Milker. This is the contract signed by me.

(Thereupon, said contract was received and read in evidence in said cause, and marked Plaintiff's Exhibit 1, and was and is in words and figures as follows:)

“SHARPLES MILKER ORDER BLANK.

Date 1/2, 1914.

Sharples Separator Co.,
San Francisco, Cal.

Please enter my order for the following Sharples Milker Equipment to be delivered as soon as possible. This order is subject to the conditions of sale and

(Testimony of W. W. Skinner.)

guarantee printed on the reverse side of this sheet.

1 six inch Pumps

Units and Equipment installed complete with instructions to my operators. Less transportation charges on outfit. Power, Belting, Countershafting, etc., not included in this Equipment.

Price \$476.65 (\$76.65—S.D.B.L.)

\$50—30 days

50—60 days

50—90 days

250—120 days.

I agree to furnish board and lodging for installer free of charge. All terms and agreements of this order appear hereon in writing.

Signed—W. W. SKINNER,

Purchaser. [113]

Prices F. O. B. San Francisco, California. Shipping Instructions.

CONDITIONS OF SALE.

This sale is made with the understanding that the purchaser will have the machine operated and cared for in accordance with out instructions. This is necessary for the profit and satisfaction of the purchaser and for the protection of the manufacturer.

Special attention is called to the following points:

That the machine be kept in good order mechanically.

That the pressure and vacuum adjustment shall be maintained in accordance with instructions.

That the cows be carefully and thoroughly stripped after each milking.

(Testimony of W. W. Skinner.)

That the machine be thoroughly cleaned after each milking and that all reasonable precautions tending to the production of clean milk be observed.

GUARANTEE.

The Sharples Milker is sold under this order is hereby GUARANTEED AGAINST ALL DEFECTS OF WORKMANSHIP OR MATERIAL and any part found to have been defective when shipped, will be replaced by the company without charge, F. O. B. its works provided the defected part is returned within one year from purchase and provided a written notice is sent to the company by the purchaser. Ordinary wear and tear, accidents or abuse are not included in this guarantee.

The company further guarantees this machine to be in all respects as represented in its printed matter, and to be capable of doing the work as claimed therein."

Mr. SWING.—We now offer the printed matter identified by the witness.

Mr. PARKE.—We object to it as incompetent, irrelevant and immaterial; this is a case of a written warranty.

Said objection to the introduction of said printed [114] matter was then and there overruled by said Court, to which ruling said defendant Sharples Separator Company, a corporation, then and there duly excepted; and said defendant, said Sharples Separator Company, a corporation, now assigns said ruling as error.

(Testimony of W. W. Skinner.)

EXCEPTION NUMBER 1.

The printed matter last hereinabove referred to was then and there marked by the clerk of said court as Plaintiff's Exhibit No. 2, whereupon plaintiff, through his counsel, read to the jury the following paragraphs from said printed matter:

"A lifetime study in the dairyman's interest enabled these experts to solve the apparently impossible problem of automatic or mechanical milking."

"The gentle massage of the teat cup with its uniform action induces the cows to let down the milk freely, a condition which frequently increases milk production."

"The teat cup with upward squeeze always is soothing, even tempered, never in a hurry. After drawing each squirt of milk it gently massages the cow's teats, keeping the teats and udder of the most delicate or hardiest cow in a soft, cool, natural, perfect condition, free from congestion."

"By the proper use of this all-important feature, which is obtainable only in the Sharples Milker, the teats and udder of either the most delicate or the most hardy cows are kept in a soft, cool, natural condition. Until we made this discovery, we never thought of offering a machine for sale, though long before that time we were owners of patents on the best pulsating suction milkers [115] ever devised."

These statements merit special consideration. They are conservative—"

Q. I will ask you to examine this piece (handing paper to the witness).

(Testimony of W. W. Skinner.)

A. Yes, sir; this printed pamphlet, or one like it, was given to me by the agent of the Sharples Separator Company during the negotiations for the sale of their machine.

Mr. SWING.—We offer this printed matter of the Sharples Separator Company in evidence.

EXCEPTION NUMBER 2.

Mr. SWING.—(Addressing the Jury.) I will read you that portion of the printed literature of the Sharples Separator Company which I deem pertinent. (Reading:)

“The Sharples Mechanical Milker is quite different from others which give the teats an upward squeeze, which not only absolutely prevents all irritation of teats and udders but actually benefits the cows and improves the flow of milk.” [116]

The WITNESS.—(Continuing.) I have examined this printed matter; this little pamphlet, or one like it, was left with me pending negotiations and I relied upon the representations contained in there.

Mr. SWING.—We offer this in evidence as Plaintiff's Exhibit 4.

Mr. PARKE.—We object to it as incompetent, irrelevant and immaterial.

Said objection to the introduction of said little pamphlet, Exhibit No. 4, was then and there overruled by said Court, to which ruling said defendant Sharples Separator Company then and there duly excepted; and said defendant said Sharples Separator Company, a corporation, now assigns said ruling as error.

(Testimony of W. W. Skinner.)

EXCEPTION NUMBER 3.

Mr. SWING.—The statements herein contained are in the form of questions and answers. I will read those pertinent to this case. (Reading:)

“Q. Is it safe to milk high-grade cows with the Milker?

A. This question has already been answered pretty thoroughly. The high-grade cow is much safer when milked by the Sharples Milker than when milked by hired help and just as safe as when milked by the owner himself.

“Q. Does it not have a harmful effect on some cows?

A. From our knowledge of what the milking machine has accomplished on the 80,000 cows upon which it is used daily, we know that the Sharples Milker has a tendency to increase the production of milk. Of some cows it does not seem to increase the production, of others it increases it anywhere up to 10%. [117]

“If the hand milkers have been poor, the Sharples Milker practically always shows an increase in milk production. The reason for this is that the ‘upward squeeze’ keeps the teats in perfect condition. The cows are milked with an even and regular motion studied by us and made correct. If the hand milkers were very good it is probable that the machine will not be able to improve upon them; otherwise, the probabilities are that it will. We know positively that the Sharples Milker never has an ill effect upon the cows, provided the machine is

(Testimony of W. W. Skinner.)

kept in reasonable order, and we keep enough experts out on the territory to see that all dairymen do keep their machines in good order.

“There is not the least tendency to dry up the cows prematurely nor have any other harmful effect.”

The WITNESS.—(Continuing.) At the time I purchased the three units, there was something said as to my purchasing an additional unit if I so desired; he said that any time I wanted to add another unit, I could add one more, two more or three more, just as I thought proper, at any time. All I would have to buy was the bucket and its fixtures; that is, its unit of bucket, pulsator, and the teat cups, and the other *fitures* that go with it. The three units arrived on February 1, 1914. After I had purchased the machine and the machine had come, the Sharples people sent Mr. Reed to install the machine; he did so; he was to install the machine and instruct my men and me as to how to run and operate the machine, and was to stay until he was satisfied and we were satisfied that we could operate the machine. He installed the machine and proceeded to run it, start it up and got it to going; and after the machine was installed and we got [118] everything going, he said he thought the boys could run it all right with my help and with assistance from the printed literature he had left there with the different instructions he left. We proceeded to milk the cows with the machine; it took the milk away from the cows all right; and after we had been running the machine some length of time, I saw that the third unit was

(Testimony of W. W. Skinner.)

not practicable for two men—the two men could take the two units a piece and operate the two units; each man would milk and strip his own cows and we could get along faster; they could manage the work better; so I went to Mr. Edgar Bros. and told him I wanted another unit. I could not tell you just how long it was before I ordered the other unit; I ordered the machine and it seemed there was some delay before the machine came, and, if I recollect right, it was along in April or May before the other unit came. I would not be positive of the time. Mr. Reed told me I could purchase another unit at any time; all there would be to do would be to hook it on to the pipes the same as the other units. Edgar Bros. knew what I was going to do with the fourth unit. I had been running the machine; the fourth unit came; trouble began to develop; my cows began to have swollen quarters; and by swollen quarters I mean one teat, two teats, three teats and sometimes four. That constitutes the quarter on a cow's udder, a teat and the part above it. Sometimes there would be one quarter, two quarters, three quarters swollen and hard, and before this fourth unit came, this trouble began to develop. I told Mr. Edgar there is trouble here, and I didn't like it. When the first cow had a hard quarter, this same Mr. Hickson landed at my place with a bunch of men to show the machine to [119] and demonstrate it. I said, "Mr. Hickson, what does this mean, over here? This cow is in a condition that I never had before. I don't know what to do about it. What is the trouble? Has the

(Testimony of W. W. Skinner.)

machine done it?" He replied, "Oh, no, no, no; the machine did not do it; that is just some local trouble that probably caught the bag, it ought not to swell it." And I went and took the cow off and began to milk it by hand, rubbed and tended to it and cared for it until it came back to practically normal; and when this fourth unit came, I said to Mr. Edgar, "This doesn't look good to me; I am not going to pay for this unit until I see whether it is going to work right";—and I never did pay for the fourth unit. They was to send this demonstrator there once a month to go through my herd and see if everything was working all right.

Mr. PARKE.—We move to strike out the last statement of the witness as to the duties on the part of the Sharples Company.

Said motion to strike out was then and there denied by said court, to which ruling said defendant, said Sharples Separator Company, a corporation, then and there duly excepted, and now assigns said ruling as error.

EXCEPTION NUMBER 4.

The WITNESS.—(Continuing.) In all cases, I took the cow off the milker whenever I found a cow with a swollen quarter, and by the latter part of June—June 25th—I had a string of thirty cows off—however there was two of these cows out of the thirty that never would milk with a milking machine. Up to June 25th, none of the cows had sustained any permanent injury.

In the month of June, Albert J. Reed returned;

(Testimony of W. W. Skinner.)

I [120] know how he came to come back; I went to Imperial to Edgar Bros. and told them that I—he asked me when I went into his place of business—he asked me how I was getting along with this machine; I said I am not getting along at all, I am milking thirty by hand.” He said, “Well, I will have to see about it,” or I don’t know just what; a few days later Mr. Reed appeared upon the scene. He proceeded to take charge of the milking machine, and put these cows back on the machine—the entire herd including those that had previously been injured. He ran the machine practically two weeks. The cows developed those swollen quarters and swollen bags to the extent that they were not worth anything for dairying purposes; the bags were ruined. The milk would not come through the bags; the bags swelled up; and later two of these cows came fresh, and when they come fresh their udders and bags were in such a condition that there could nothing come out. The calf could not get anything out, and you couldn’t get anything out of it; the bag just begin to swell and swell until it began to swell all over and die. The cows had not been exposed to any contagious disease. I had a veterinary examine them. Three cows died. As to the other cows, their bags were just swelled. As nearly as I could explain how their bags were, if you go and bruise your hand or bruise your leg, and it were to raise up in an old boil in two or three days it come to a head and if you would *lit* that open it would run out corruption. Pus came out of the teats, where it could come out.

(Testimony of W. W. Skinner.)

There were two of the cows I saw were going to die if there was not something done and I took my knife and cut the udder open, and the whole thing just ran out—from two of the cows—the udders were rotten and had a bad odor.

During Mr. Reed's time, he had a veterinary; he examined the cows and gave a prescription; Mr. Reed and myself [121] and another man that I had, we gave this prescription according to directions, and I took this one man and put him in the corral, segregated those cows from the herd, and told this man, "Don't you do anything else in the world but tend to these cows—just stay right here and try to keep them from dying and save what you can," which he did. Prior to my putting the milking machine on these cows, I never had anything in the nature of a swollen quarter.

After Reed left on the 7th of July, the milker was not run any more, and lay idle until the latter part of October. When Mr. Briggs appeared on the scene one day and told me he had come down to straighten up the milking machine business with me. I had never seen him before.

The COURT.—State what Briggs did.

The WITNESS.—I can't well state what he did without I tell you what passed between us. Briggs, he wanted to start the machine again and I would not agree to it.

Mr. PARKE.—We move to strike that out as to what Briggs wanted to do.

Said motion to strike out was then and there de-

(Testimony of W. W. Skinner.)

nied by said Court, to which ruling said defendant, said Sharples Separator Company, a corporation, then and there duly excepted, and now assigns said ruling as error.

EXCEPTION NUMBER 5.

The COURT.—Just what did you do?

The WITNESS.—I finally agreed that if they would take charge of the machine on 30 cows—

Mr. PARKE.—If the Court please, we object to any agreements entered into by and between Skinner and Mr. [122] Briggs, or anything in the nature of a warranty; this machine was sold on a written warranty; Briggs had no authority to contract.

Said objection was then and there overruled by said Court, to which ruling said defendant, said Sharples Separator Company, a corporation, then and there duly excepted, and now assigns said ruling as error.

EXCEPTION NUMBER 6.

The WITNESS.—Briggs wanted to start the machine. I told him I would not let him do it. That was first. He then came back again. He and I went to Mr. Edgar Bros. and we came to an agreement. That agreement was later put into writing; this is the writing I entered into; my signature is at the bottom there; that is my signature; this H. S. King is Mr. Edgar Bros man—I desired a witness. But for my receiving this written paper, I would not have allowed Reed to restart the machine.

Thereupon plaintiff offered in evidence a purported agreement, to the introduction of which in

(Testimony of W. W. Skinner.)

evidence said defendant Sharples Separator Company, a corporation, objected as irrelevant and incompetent, and incompetent as it involves representations other than those appearing on the written guaranty. A ruling upon the admissibility of said purported agreement and the objections of said defendant Sharples Separator Company, a corporation, to the admission in evidence of said document was by said Court deferred pending argument of counsel.

The WITNESS.—(Continuing.) Before the time when Briggs came, there were 20 cows ruined—I mean ruined for dairy purposes; and by ruined for dairy purposes I mean that they were not any good for dairy cows; those cows that [123] had not died were worth their price for beef. They were not worth anything at all for dairy cows. Prior to the time they were hurt, they would be worth \$250, \$200, \$150, \$125, and \$100. There were five Guernsey cows worth \$1100; after they were hurt they were worth \$50 apiece for beef. There were three of them valued at \$200 apiece and two of them at \$250 apiece. One of the Guernsey cows died. I had ten Jersey cows ruined. Five of those Jersey cows were worth \$125 apiece prior to their injury; and afterwards, I got \$250 for the five of them for beef, \$50 apiece. I had five other Jersey cows valued at \$100 apiece, that is, \$500; one of those \$100 cows died; afterwards, I got 50 apiece for the rest of them. I had two Durham cows valued at \$100 apiece. One of those cows died; I got \$50 for the other one. There were ten

(Testimony of W. W. Skinner.)

more cows that were ruined; seven of these were after Briggs came, three of them were before Briggs came; they were ruined for dairy purposes. I sold them for beef for \$50 apiece; they were worth \$80 apiece at the time they were injured. Those cows were worth what I asked for them; that was their market value; I wouldn't have took the market for them at the time they were injured. My total after crediting them with \$50 apiece for those that I was able to sell is \$2,025.

Q. And how long did you have to pasture them before you were able to sell them?

A. I kept 8 of those cows—sold 8 of those cows in June, 1915.

Q. That would be one year after they were injured? A. I received \$400—

Mr. PARKE.—We move to strike out the testimony as [124] to pasturing the cows, it being incompetent, irrelevant and immaterial, no special damage of that sort alleged; there is no prayer for any damage save and except the injury to the cows. Whatever damage was suffered, if the defendant were liable, if that were competent as of that date, you can't pay for pasturage; if you could, you could charge us indefinitely for pasturage.

The COURT.—None of that is in your complaint?

Mr. SWING.—It shows the net amount to which he was entitled.

The COURT.—You may amend your complaint if you wish to; the objection will be overruled.

Mr. PARKE.—Note an exception.

(Testimony of W. W. Skinner.)

And said defendant, said Sharples Separator Company, a corporation, now assigns said ruling as error.

EXCEPTION NUMBER 7.

Q. Did you suffer any loss as the result of the operation of this milker upon your herd in the quantity or amount of milk or butter fat you received from that herd?

Mr. PARKE.—We object to the question as calling for the conclusion of the witness.

The COURT.—Objection overruled.

Mr. PARKE.—Note an exception.

And said defendant, said Sharples Separator Company, a corporation, now assigns said ruling as error.

EXCEPTION NUMBER 8.

The WITNESS.—I did. The other cows this milker was used on that were not injured went off on their milk; the only way I have of getting how much less milk they gave is in my cream sheets. These cows were injured during the last days [125] of June and the first days of July; in June and July my cream check dropped \$142.13; it never did go back up again. If they had not used this milker the cows would, in my opinion, have held up. The milk that I lost by reason of this amounts, I think, to \$1500—the value of it.

Said defendant, said Sharples Separator Company, a corporation, thereupon moved to strike out all of the testimony of the witness on the value of the milk, as stating a mere conclusion; said motion

(Testimony of W. W. Skinner.)

was then and there denied by said Court, to which said ruling defendant Sharples Separator Company, a corporation, then and there duly excepted, and now assigns said ruling as error.

EXCEPTION NUMBER 9.

The WITNESS.—(Continuing.) The reasonable value of this milking machine in the condition in which it was found to be by me after I bought it, is that it was not worth anything; if it had been the way it was represented by the company it would have been worth a thousand dollars.

At this point, the jury retired from the courtroom and the Court heard argument by counsel as to the competency of the purported agreement alleged to have been entered into in October, 1914, between the plaintiff personally and said defendant Sharples Separator Company, a corporation, by one F. L. Briggs; and said Court then and there ruled that such purported agreement was not competent evidence in this case and sustained the objection made thereto by the defendant Sharples Separator Company, a corporation.

Thereafter, said jury returned into court, and the following proceedings took place:

Mr. SWING.—In accordance with the suggestion made [126] this morning, I prepared an amendment to the amended complaint, covering more in detail the question of damages, and I have served a copy upon Mr. Parke, and I would like leave to file the amendment.

Mr. PARKE.—We object to the filing of the

(Testimony of W. W. Skinner.)

amended complaint upon the grounds that it attempts to set out elements of damage not set out in the original complaint, or in the bill of particulars furnished by the plaintiff; and that the defendant, Sharples Separator Company, a corporation, has had no opportunity of investigating the question of damage set out in the amendment; and that at this time, the plaintiff should not be permitted to insert other and different claims for damages than those covered by his original bill of particulars and complaint.

Said objection was then and there overruled by said Court, to which ruling said defendant, Sharples Separator Company, a corporation, then and there duly excepted, and now assigns the said ruling as error.

EXCEPTION NUMBER 10.

Mr. PARKE.—I suppose it is stipulated that this amendment to the amended complaint may be deemed denied?

Mr. SWING.—I will so stipulate, yes.

Thereupon, the witness W. W. Skinner was recalled, and his direct examination reassumed as follows :

The WITNESS.—I quit using the machine in June. Biggs came there in October. I had not used it until that time. I had not intended to use it any more.

Q. After Biggs came, you started in to use it again?

A. Well, no; I didn't use it. Mr. Reed had—he did all the using; he did everything to it; I never touched it, [127] and none of my men—I gave my

(Testimony of W. W. Skinner.)

men strict instructions not to touch the machine under any conditions. Mr. Reed used it after Briggs came there.

The COURT.—Q. Did you consent to its being used on your cows by reason of what Briggs induced you to do?

Mr. PARKE.—I dislike to object to the Court's questions, but we object to the question as to the conditions under which he started the use of the machine.

Said objection was then and there overruled by said Court, to which ruling said defendant, said Sharples Separator Company, a corporation, then and there duly excepted, and now assigns said ruling as error.

EXCEPTION NUMBER 11.

The WITNESS.—A. Yes, sir. In October, the machine was used practically two months, and a man by the name of Reed operated it. I did not employ Reed. Mr. Reed came and took charge of the machine on a string of cows; Mr. Reed and Mr. Briggs were there when the machine started, and they selected their cows that had not been injured—young cows—and then selected a herd that they thought the machine would milk—I do not know that they thought that, at least they picked such cows as they wanted. I had nothing to do with it. I told them to pick the herd and get just such cows as they wanted; I had nothing to do with selecting the cows. The machine had gotten dirty; they took those things and boiled them, and put in new rubbers and started them up on those thirty cows. Mr. Reed had abso-

(Testimony of W. W. Skinner.)

lute control of it; I had nothing to do with it at all. It had not been there but just a little bit and the cow came ino the corral with one of those bad quarters. I had cows that had not been milked [128] with the milker in that herd; there were two strings; some of those cows had had the milker on them in June and July. I had cows that this milker was not put on at any time; it is a hard question to answer how many; I had some young cows. No cows got diseased that were not milked with that milker. Up to July, they milked all the cows with the milker; I had some cows that came in after that that were not milked with the milker; but they selected some of those cows that had come in—young cows, and put the machine on them in October and November. After October, seven of the cows were hurt and some of them injured; I only claim those absolutely ruined for dairy purposes; some of them were injured that I put in no claim for. As to the value of those cows that I say were ruined, I would have to get my instructions out again to segregate those different cows.

Q. What do you mean by instructions?

A. I will show it. I just made a list from my books, the day-book, and when I want to get at this, and that is the only way I could remember it, was to set these different cows down at the different places, and that was the only way I could keep that. I made this memorandum myself—just a memorandum, that is all there is to it. Those seven cows were worth \$80 apiece, and after they were injured they were worth \$50 apiece.

(Testimony of W. W. Skinner.)

Mr. SWING.—Q. With reference to the guarantee which he gave you, or purported to give you at the time you consented to restarting the milker, I will ask you if at any time since you have ever received any notice or intimation from the company that that was not a valid contract or guarantee? [129]

Mr. PARKE.—We object to the form of the question—that a guarantee was given by Briggs; and if that alleged contract was not binding upon the company, it would not make any difference whether they ever repudiated it or not, if there was no consideration therefor.

Said objection was then and there overruled by said Court, to which ruling said defendant, Sharples Separator Company, a corporation, then and there duly excepted, and now assigns said ruling as error.

EXCEPTION NUMBER 12.

The WITNESS.—They did notify me.

The COURT.—Did they ever notify you that Briggs was not their agent and had no authority to do what he did do?

EXCEPTION NUMBER 13.

The WITNESS.—No, sir.

Mr. PARKE.—We move to strike out the answer of the witness.

Said motion to strike out was then and there denied by said Court, to which ruling said defendant, Sharples Separator Company, a corporation, then and there duly excepted, and now assigns said ruling as error.

EXCEPTION NUMBER 14.

The WITNESS.—(Continuing.) I do not know

(Testimony of W. W. Skinner.)

who selected [130] Reed to operate that machine. Mr. Briggs asked me when he wanted to send a man if I had any preference as to whom he sent. I told him I did not; I said "You will do." He said, "I can't do it, I am too high priced a man; the company would not leave me here anyhow; I have no time; how will Reed do?" I said, "Reed will do all right; you can send anybody you want. It is up to you people, the Sharples Separator Company." While Reed was working on my ranch from October 20th to December 20th, he was in regular communication with F. A. Frank, Pacific Coast manager of the Sharples Separator Company; he received letters, of which I read two. I am not able to identify, from the substance of these letters or any of them, that these are the copies of letters that I saw Reed have; I never read either one of these. I read two letters, and neither of these are the letters.

Mr. SWING.—Q. At the time Albert J. Reed quit, if he did, on December 20, state what, if anything, he said at the time he quit.

A. When Mr. Reed quit?

Q. Yes.

Mr. PARKE.—We object to that as incompetent, irrelevant and immaterial; and there is no evidence before this Court of any kind, nature or description that Reed was agent of the Sharples Separator Company.

Said objection was then and there overruled by said Court, to which ruling said defendant Sharples Separator Company, a corporation, then and there

(Testimony of *W. W. Skinner.*)

duly excepted, and now assigns said ruling as error.

EXCEPTION NUMBER 14-A.

The WITNESS.—A. The first intimation that I had [131] that Mr. Reed was going to quit, I walked into the corral and there was one of the cows showed that she was not feeling good, and I was in a hurry and was going to the ranch, and I said, “Mr. Reed, is that cow sick?” He said, “Look at her bag.” And I just stopped, and it was a heifer and the bag was all swollen up, and I didn’t say a word, and Mr. Reed didn’t for half a minute, and then Mr. Reed said, “Skinner, I am going to quit; I have ruined the last cow with this machine that I expect to ruin.” He quit, and I took him to town, and after he got to town, the first thing he did, he went in and talked to Mr. Edgar. He made in my presence a statement to Mr. Edgar regarding his ability or inability to run the machine.

The WITNESS.—(Continuing.) Reed quit. After he went in town, he sent Mr. Frank a telegram. I saw the telegram written; it was written by Mr. Reed.

Q. Do you know his handwriting; are you able to identify that (handing paper to the witness)?

A. It is very much like it. I believe it is.

Mr. SWING.—We offer now in evidence the copy written by Reed, which is attached to this deposition in which Reed testified in his handwriting, and which he wrote and also the original furnished by the Company, which is word for word like this. I offer the two. [132]

Mr. PARKE.—We object to that as incompetent,

(Testimony of W. W. Skinner.)

irrelevant and immaterial; and further that no evidence is before the Court that Reed was agent for the Sharples Separator Company, or any other employee at this time.

Said objection was then and there overruled, by said Court, to which said ruling said defendant Sharples Separator Company, a corporation, then and there duly excepted and now assigns the same as error.

EXCEPTION NUMBER 15.

Mr. SWING.—I will read this to the jury:

“Dated El Centro, California, December 18, 1914. (Reading:) Sharples Separator Co., 420 Mission Street, San Francisco. Have done everything possible. Serious trouble started again. Taking too big risk to continue use of machine. We have discussed every possible phase of situation, but quit milking, safest way, or we will have too big a loss, according to our agreement. Will await instructions here. Wire at once. Albert J. Reed.”

Said telegram was then and there marked by the Clerk as Plaintiff's Exhibit 5.

After Reed quit on the 20th of December, 1914, I did not again operate the milker; it has never been operated since. I offered to return the machine to Mr. Edgar; I offered to return it to Mr. Edgar Bros. man; and I also told Mr. Reed, “It was your machine,”—I told Mr. Reed that in July, and when he quit the last time I told him the same thing. I said, “I don't want it any more,” and he went off and left the buckets and the units sitting out there in the

(Testimony of W. W. Skinner.)

yard. I have not had any udder trouble, [133] swollen quarters, or anything of that kind, since the milker was quit being operated. I have met the Pacific Coast agent for the Sharples Separator Company in the spring of 1915, Mr. F. A. Frank, at my home; he examined my cows that I had injured.

Q. What else did he do there, if anything; did he make any statements relative to the injury?

Mr. PARKE.—We object to any statements being made here on the ground that there is no evidence before this Court that Mr. Frank then had any relation to the Sharples Separator Company; and upon the ground that if any statements were made, they were made in the course of an offer to adjust or compromise this matter, and would not be binding upon either Mr. Skinner or the Sharples Separator Company.

The WITNESS.—My conversation with Mr. Frank was in relation to an adjustment or settlement of the matter between me and the Sharples Separator Company.

Mr. PARKE.—We renew our objection; we object, of course, to any admissions made in the course of a compromise; and irrespective of whether it was a settlement or not, we object to any admissions on the ground that the general manager had no right to make admissions or bind the company by any admission—he cannot give away the property of the company by admissions.

The COURT.—Objection sustained.

(Testimony of W. W. Skinner.)

Cross-examination.

I did not have an understanding with Mr. Reed when he came down there on the 20th day of October, that I [134] should pay him \$75 a month; I had no arrangements at all about paying Mr. Reed for the time he should be there; I did not trade with Mr. Reed; I did not consider Mr. Reed in it at all. I did not send for Mr. Reed when he came down to my place in April; if I remember rightly, why, I notified Mr. Edgar I had had some trouble, and Mr. Reed appeared on the scene immediately afterwards. I first began to use the machine about the 7th of February, I think; and I think I received the fourth unit from Edgar Bros. in May; and I took the fourth unit from Edgar Bros. and connected it up and used it after that—after May. I had had other trouble before I got the fourth unit. As to what cows I used the fourth unit on, I used the fourth unit the same as the others. The four units, as nearly as a man could look at them and say, were identically alike; if a man was to hand that unit up and another unit up, he could not go and pick out which were those units. I kept no record of the cows upon which the particular units were used. I did not make or keep any record of the amount of milk obtained from each individual cow.

Q. Well, you have set out in your bill of particulars furnished to the defendant the amount of butter fat which you received from your cows during the month of January, the month before you began using the machine, at 1619.77 pounds; is that correct?

(Testimony of W. W. Skinner.)

Mr. SWING.—I will stipulate; I compiled that myself; there is no question about that.

Mr. PARKE.—Do I understand, then, it is stipulated that that is the amount of butter fat he received in January?

Mr. SWING.—Yes. [135]

The WITNESS.—Mr. Parke, will you please run off the total of that at the price?

Q. (By Mr. PARKE.) There was no price, Mr. Skinner, during the month of January, on your bill of particulars.

A. Well, those figures run right on down there, various sums.

Q. 22 to 25 cents, I know, but the pound there of butter fat.

A. Take the first one there and multiply the pounds of butter fat with the price.

Q. Well, there is no price set for January.

A. There is 22 cents there.

Q. No; there is not.

A. Doesn't it say 22 cents?

Q. It is stated for March, 22 cents,—stated for January and February. Now, Mr. Skinner, did you determine the amount of butter fat which you obtained from your herd during the year of 1914?

A. How did I obtain that?

Q. How did you estimate? How can you estimate the amount of butter fat which you obtained during the year 1914?

A. I can go to the creamery and get their slips. I went to the creameries to which I sold my butter fat

(Testimony of W. W. Skinner.)

and got the slips. I have not got the amount of cash which I received for butter fat in January, 1914; I could not tell you the amount. There are two or three different ways of arriving at the damage of \$1,500 for loss of butter fat. In June, my cows were averaging better than \$6 a piece for the butter fat. There were 20 of those cows knocked out the last of June or the first of July. You multiply the number of [136] cows that were out of the herd by the average; those cows that were injured were over average cows. That is the way I arrived at the amount of butter fat I lost each month. You take the average of the herd and you multiply it by the number of cows that went out of the herd and were injured, and multiply that then by the number of months between the time these cows went out and I brought this suit. I estimated the loss of butter fat up to the time this suit was brought; I computed the loss of butter fat right down to the date this suit was filed, in arriving at the \$1,500. The amount of butter fat that I received each of the months of 1914, as set out in this bill of particulars, and the price at which I sold butter fat those months, is not correct for all the months. In June—this is for the Imperial Valley Creamery; I sold part of my stuff to a man that had the small creamery who produced butter for the local market; they went out of business, and I went to this man and asked him if he could give me a record of that; he told me he did not have any records, and he could not give it to me.

Q. Then, what months are correct, except June, as

(Testimony of W. W. Skinner.)

to the amount of butter fat which you sold from your herd, as nearly as you could determine it from the records of the creamery? A. Well—yes.

Q. And during the month of June, instead of receiving some 1,576.9, you received some additional—how much did you estimate?

A. Well, it amounted to \$600.15 sold during June; and the average price at that time which I set out here, was 26 cents,—so that \$600 worth of butter fat should be added [137] to this schedule I set out in the bill of particulars for the month of June. You multiply that at the price, and subtract \$600.15, and you will get what the other creamery has.

Q. And in all other respects, the items set out in your bill of particulars, all except the month of June, and the price at which you sold your butter fat during those months is correct?

A. Those people got a little in May; I sold a little more butter fat than is indicated by this bill of particulars during the months of May and June.

In January, 1914, I was milking practically three strings of cows—90 cows. In June, 1914, we were milking 100 cows. In October, November and December, 1914, I was milking the three strings of cows. Practically, I was milking the same number of cows all during the year. Cows give more milk at some seasons of the year than at others. In Imperial Valley, as a rule, the months of October, November and December are the best months of the year. As a rule, the milk falls off along in the winter; and by winter I mean January and February,—

(Testimony of W. W. Skinner.)

usually, February is as low a month as you will have. I disposed of two cows that I claim were injured in 1915, and disposed of 6 of them in 1916; I still have a few of them that I have never been able to get on the market. All these cows that I claim were permanently injured, I did not milk after Reed left in December; I have not milked them to date.

Q. How much did you pay for the milking machine to the Sharples Separator Company?

A. I think it was about \$460; I took advantage of a [138] discount they gave and paid it off, and it amounted to about \$460 that I paid the Sharples people; that does not include the installation of the machine. I paid to the Sharples Separator Company for the three unit milking machine the sum of \$461.42 as my check shows. I have set out in my bill of particulars that I paid \$175 for an engine; that was a gasoline engine; I still have that engine; I am using it in running my separator; and I have used it at all times to run my separator; I use it because I had it and I could not dispose of it; I never had one before I bought it to run this machine with. I do not consider that it is worth anything to me to run the separator with, because I have to pay my men the same to separate it by hand; I suppose it is of some value; it is in good shape and was in good shape when I ceased using the milking machine. I set out in my bill of particulars that I expended \$370 purchasing lumber to build stanchions for my cows; that was built for the purpose of in-

(Testimony of W. W. Skinner.)

stalling this machinery. I paid \$370 for lumber to build stanchions with; I am using those stanchions now; and I have continued to use them ever since I installed them.

Q. Isn't it customary among milking men to use stanchions whether they use milking machines or milk them by hand?

A. They are used by very few in Imperial Valley. By stanchions I mean a place for the cows to go in and stick their heads through so you can fasten them and they can't get away from you; not necessarily to hold them still while you are milking them; for keeping them from getting loose; they poke their head through there and you draw their head up fairly tight so they cannot move; it avoids [139] the necessity of tying the cows and prevents them running around the stable. I have not any check of the amount I paid the lumber company; I bought the lumber from the Imperial Valley Lumber Company; that lumber bill includes cement, lime and nails. I put the cement underneath; I cemented the floor where the cows stand, and that cement is still there. It is not customary in Imperial Valley for dairymen who desire to run a clean dairy to cement their floors—it is not a custom; most of them have just an ordinary dirt floor.

Q. Isn't a cement floor much more sanitary, and isn't a dairy better equipped that has a cement floor than a dirt floor, and you could run the milking machine better with a cement floor?

A. They told me to put a smooth floor under them.

(Testimony of W. W. Skinner.)

Q. They didn't advise you that was necessary for the operation of the machine, but it was advisable for sanitary reasons; is not that correct?

A. They didn't say it would make the milking machine go any better.

Q. Well, it wasn't necessary, was it, Mr. Skinner, to put in a cement floor in order to operate the machine?

A. Well, I will say it was, either a cement floor or a plank floor; and the reason why is you put those cows in those stanchions on a dirt floor, with more or less liquid and manure under there, which makes that dirt soft, and the cows were just stamping in the mud; that would be true if I tied the cows in the stable without a floor.

Q. You really, Mr. Skinner, needed a floor in your barn?

A. I did not have any barn at all; I had been operating [140] there since five years ago without a barn. As to whether my barn is more sanitary and a better barn for milking for dairy purposes now that it has a floor in it, I would not give a man \$10 to go and install one. All of the best dairies do not have a cement floor or some kind of a floor. The amount that I paid for the cement, and the amount that I paid for the lumber constitutes the bill; I cannot segregate the items; aside from cement, sand and lumber, there was an item of nails.

Q. In fact, that is the cost of fixing up your barn, including the cement floor and the stanchions, and

(Testimony of W. W. Skinner.)

cleaning up the surroundings to make them sanitary? A. Yes, sir.

Q. And those are the things that Mr. Reed and Mr. Hickson advised you should be done in order to make the dairy sanitary?

A. Well, I had to build the stanchions; they told me that I would have to build stanchions before they could install the machine. As to whether you milk several cows at the same time with that machine, it is owing to the units; you milk one to the unit; and you would have to have the cows fastened in a row. Most dairies in Imperial Valley do not fasten the cows in a row, whether they milk them by hand or a machine, for the simple reason in the spring, summer and fall it is so hot you get in there, the men will not work,—unless you have got an extraordinarily cool place they object to it; you can build what you call California shingles—build a shed and the cows walk under that, and most men prefer that to a barn of any kind, because it is cooler, and there are very few people that have [141] those stanchions.

Q. I show you a diagram of a Sharples milker and ask you if that is what is known as a unit, together with the milk pail and the teat cups?

A. From here, this pulsator, and to here, is considered a unit (indicating). I could not tell you whether the two pictures on the right-hand side thoroughly depict the method of operation of the teat cup on the teat of the cow, because this is all enclosed here, and the teat goes in there, and you

(Testimony of W. W. Skinner.)

cannot see it; it has a vacuum and a pressure; so far as the way it handles the teat, I do not know. This inside is made of rubber; the inside is rubber, and the outside is metal, and there is a metal band that goes right around the teats here—right at the top of the teat there is a large metal band which holds this metal in—that goes right up against the cow's udder. I had trouble with quite a number of my cows which were in a diseased condition, and had caked udders before I connected the fourth unit, not before I had ordered it; I could not tell you the number, but I should say 15 or 20 cows were affected before I put the fourth unit on. Throughout the entire year of 1914, at least one-half of my herd were affected—at least 50 from the use of the machine.

This is the machine, or a likeness of the machine which was installed; this is a little bit more polished, and looks a little brighter than mine did. These four things which I hold in my hand are the four teat cups placed upon the four teats of the cow, and the pail upon the floor is the milk pail, and the article which I now hold in my hand is the pulsator, and the whole thing constitutes one unit. I got three units of this kind from the Sharples Separator Company, [142] *Sharples Separator Company*, and then one later on. This unit is attached to overhead pipes carrying air from an air pump, and by hooking this unit on to the overhead pipes you thus connect it with the engine and with the air. When you desire to move this unit from one cow to another, you merely disconnect this pulsator from the over-

(Testimony of W. W. Skinner.)

head pipes and move it on to the next cow and there fasten it on again. I got to operating the machine—that is, I would go in, watch the boys and help; I would be in there—well, I have operated that, not regular. Mr. Reed instructed me and my son and the young man that worked for me named Allen, as to the manner in which the machine should be operated when he first installed it. In point of fact, after the machine was installed in February and until I discontinued the use of it, it was used by my son, this young man Allen, and Mr. Reed when he was there. My son is 21 years old and Allen was 22 or 23 years old. All that they knew about the machine was the instructions they received from the book of instructions that the company furnished and from Mr. Reed. This young man Allen and my son did most of the milking.

I understand the theory upon which this machine works; I did at the time; it has been so long that there might be some minor thing that might have slipped my memory. I understand that the teat cups which fastened upon the teats of the cow cause a squeezing of the teat—there is a squeezing pressure, and then there is a vacuum which sucks the milk out of the teat; the vacuum comes in direct contact with the teats. Outside of this chamber comes a rubber lining. The pressure squeezes the teat, but not like [143] the hand. The air comes in contact with the cow's teat. The pressure comes in between the inside metal lining and the metal casing of the teat cup; it massages the teat; it does not

(Testimony of W. W. Skinner.)

squeeze it. When the pressure is removed, then the vacuum is created, and that draws the milk out of the teat; and this pulsator which is fastened on to the air pipes from the air engine is so constructed that when the air is on it works back and forth in this manner (manipulating the machine); and the way I understood, when the pulsator tips one way the pendulum therein shuts off the pressure, and when it tips this way it lets the pressure on. The way I understood it, the air causes the pulsator to tip and the pendulum to slide from end to end thus causing alternate pressure and vacuum. There is no gauge on the air pump to regulate the amount of pressure; there is a gauge on the pressure to indicate the amount of pressure, and also one on the vacuum pipe; the gauge indicates the amount of vacuum and the amount of pressure going into the teat cups. There is also upon the pulsator certain levers or adjustments which regulate the amount of pressure which is admitted through the pulsator to the teat cup. The instructions say that to move this thing right here (indicating on the machine) would regulate the amount of pressure and the amount of vacuum; I do not know whether it does or not. I do not know that I ever tried it by putting my finger in the teat cup to see the amount of pressure that was caused on my finger where the cow's teat would be, and on the pulsator. As to the pressure at which I milk my cows, I used 17 and 7; the vacuum 17 and the pressure at 7; I did that all the time on every cow; I made no [144] change in the amount of

(Testimony of W. W. Skinner.)

vacuum and the amount of pressure when I was milking a large teated cow; I made the gages stand at 17 and 7 all the time.

Q. And used that pressure all the time, without regard to whether she was an easy milker or a hard milker?

A. Well, I am just going to tell you now, my instruction was when that ring around the top of that would cause the teat to inflame or be red, the thing to do would be to move this screw here, so as to relieve that. I moved that screw; there was very little results to it,—the only results that I got was injured cows.

I had ordered this fourth unit, and it came; I ordered it before I had any serious trouble. When Mr. Hickson appeared on the scene, I asked him if the milker was causing the trouble, and he said, "Oh, no." He assured me that it was not, but possibly the cows might have gotten hurt. Well, at the time I had not had enough experience with the cows being in that condition at that particular time to hardly know.

Q. Do you mean to tell the jury, Mr. Skinner, that when you move this lever over on the end from the point indicated as the "on" and the point indicated "off," it made no difference so far as you could determine in the amount of pressure?

A. It didn't affect the cows; it did not change them. My instructions were never to change the gauges—to make them stand at 17 and 7, under all conditions. The book of instructions made that

(Testimony of W. W. Skinner.)

very explicit, and every letter and every correspondence also—to make it stand at 17 and 7. I had a card that they made me hang up in the stanchions—to hold at 17 and 7. [145]

Q. That was in the air line, Mr. Skinner, you would have 7 pressure and 17 vacuum in the air line which run over the heads of the cows, isn't that true—the gages fastened on these air lines next to the pump? A. That is it.

Q. But their instructions to you were that you should use the lever on the pulsator to regulate the amount of pressure that was needed in the teat cups, were they not?

A. When the cows would become red around where the top of that teat cup pressed up here (indicating), to increase that pressure—increase that lever; they said that would increase the pressure on that particular cow and prevent that. I said that I made a change according to whether the cow was an easy milker or a hard one; I would move that lever on there when they would get to a cow that would make that ring,—why I would move that lever; they said that would increase the pressure.

Q. Well, I say did you increase the pressure on your cows or decrease it?

A. I will tell you what instructions they gave me; they said it would increase the pressure. I followed the instructions carefully, every word; I studied it like a school book; I received a book of instructions; but I have not the book that I received. I could not say that this book which you show me now is a

(Testimony of W. W. Skinner.)

copy of the book of instructions which I received with this machine; this is a book of instructions, but whether it is like the one that I received, I would have to look it over to be sure it was identically the same. I have not got the book which they gave me; it became destroyed; it was hanging in the [146] separator house; and after we discarded the machine, it just went to waste, went to nothing. I could not tell you what did become of it. I never expected to have any use of it any more. This looks like the book I had. It might be a later publication; there might be some difference in it; I am not sure about that; but my book was similar to that with the instructions.

I did not boil the teat cups—that is, I did not boil the portion of the unit which comes in contact with the cow—I did not boil them after each milking. I cleaned them, but not in boiling water. I sterilized the teat cups while I and my boys were running the machine. My instructions were to keep the teat cups in lime water. This part (indicating) went into the lime water—was to be kept in the lime water; and that is what I did. I never put them in any water containing any antiseptic other than lime water or in boiling water; I had no instructions to. After I found that my cows had caked bags, I did not use this machine upon them, only at Mr. Reed's directions; before Mr. Reed came there, I guess not.

Q. What would you do with the cow as soon as you noticed she had—

A. Milked her by hand. I never washed or

(Testimony of W. W. Skinner.)

cleaned the teat cups between one cow and another at any time; after I milked the cow I did not clean the teat cups before I put them on another cow. As to whether I milked any cows that had inflamed udders, the minute they showed any inflammation, I took the machine off. I did not have a veterinary at my place before I purchased the machine, to see my cows.

Q. Did you not state to Mr. Reed that you had some garget [147] among your cows, before you bought the machine? A. No, sir.

Q. You are certain that you did not?

A. Now, you wait, Mr. Parke; let me explain a little bit. The word "garget" is an expression that is used among the ordinary dairymen; it is a usual expression. I understand by garget, when a cow would come fresh, when it first comes fresh, if that cow is an extra heavy milker, very often her bag will be swelled and puffed out until the milk gets out; that is the way we term it. When a cow first comes fresh, her milk is not good, it is rather thick for awhile and has blood stains in it; it is not good; and sometimes a cow's bag will be swelled from that cause. That is what I understand by garget; that is the way we use it; when she comes fresh, if there is no mucous, when it first comes fresh; it was just an expression that the ordinary dairyman used. I had had cows that had garget, as I understand it, before I used the milking machine. I had had a few cows that were extra heavy milkers, that their quarters would be puffed, not swollen. There

(Testimony of W. W. Skinner.)

is a difference altogether. A man could, while milking from one of these milking machines, go in a herd and pick them out; he did not have to put his hand on it to tell.

Q. What did you tell Mr. Reed about trouble in your herd before you began using the milking machine?

A. I told Mr. Reed that I had a clean herd. He said I had a clean herd when he came to install the machine; he said, "Skinner, you have the cleanest herd I ever put a machine on."

Q. Didn't you tell him you had some trouble before you put this machine on? [148]

A. No.

Q. What were you going to explain to me?

A. Possibly, I might have used the expression to Mr. Reed that way.

Q. That you had had some garget?

A. Yes; I might have used that expression in that way.

I never had any injury to cows' teats: I never had any trouble like that; I never had any cows step on it before. I never had any step on it since. The condition of the cow's udder which developed after I used the machine was entirely different from the condition which developed when the cows first came in. As to the number of cows that had caked bags after I began to use the machine and showed evidence of pus in the bag, there were the 20 cows that were injured in July and June. Practically every cow that I claim sustained personal injury had a pus

(Testimony of W. W. Skinner.)

formation in the bag; that pus was not good stuff; it ruined the bags. Mr. Reed had Mr. Cram, a veterinarian, call in to examine my cows; he explained the matter with the cows in his own terms, in words that the doctors have. As to whether he told me that it was infectious mammitis, well, I don't—I would not say that he did, and I would not say that he did not. I do not think that he cautioned me about the danger of this disease spreading from one cow to another. I do not think he told me what should be done by way of preventive to spread the disease. I do not think he told me to sterilize my barn yard and clean it up. He gave me a prescription, and I went and had it filled; he gave us some medicine to give to the cows, and some that we injected into the teats. He did not tell me anything that I remember [149] about cleaning up the barnyard. If any veterinary visited my yard during the year 1914, for the purpose of examining the cows or taking extracts of milk, I did not know it. If a Dr. Taylor was ever on my ranch, I do not recall it since it was first brought up; and if ever Dr. Taylor was on my ranch, he was lying under cover; I do not remember it at all. If Dr. Taylor was there with Mr. Briggs, I do not know it.

My cows get their drinking water out of the drinking places; I have two kinds of drinking places. We had to run our water into settling basins out of the ditch. That is all the kind of water we have for domestic purposes, or any kind. This water goes into the settling basins and settles. I have a place like this, the settling basins, I have a plank wall

(Testimony of W. W. Skinner.)

right across here (indicating) back out so the cows can drink water just the same as if they were in the trough, and the pipe-line furnishes this water from that into this drinking place—out of the settling tank into this drinking place, so the cows can drink there. I also have some big tanks that I dug and set down into the ground and let the pipe run from the main tank into this tank, and keep the tank up so high—the water keeps just so high in these tanks set in the ground. All of the water in Imperial Valley comes from a common source, the Colorado River. I know where the Date Canal is.

Q. Is that water in the canal the same water that your cows drink?

A. All the water that comes in the Valley, comes from the Colorado River. Such water as one gets in the Barbara Worth Hotel, I think they claim they have the water filtered— [150] the water that is served on the table; but the regular pipes, the City has that water from the main canal coming from the Colorado river—that is where the City gets its supply of water.

Q. What was the condition of your barnyard as to drinking places for cows during 1913, up to the date you got this milking machine?

A. Well, I begin to make a little money in 1912 and 1913, and I was improving my ranch; when I went on the ranch there was not a settling basin on it; I fixed most of those places—the main settling tank and then pipes to the small troughs, if I recollect correctly in the winter and fall of 1913. Now, as

(Testimony of W. W. Skinner.)

to the immediate time that I fixed those things, I could not tell you. As I saw, when I went on the rancy there was not a settling basin for the cows to drink out of, and I had lots of work and I didn't have the time to do it, and as I got a little bit of money I began to improve it. Most of the people in the Imperial Valley permit their cows to wade out in the irrigating ditch. A great many of them still do that. When I first got the cows, I did the same.

Q. And up to how late a period did you?

A. Just as quick as I could get that work done.

Q. That was in the latter part of 1913, was it not, even after you got this milking machine?

A. I am not going to answer that in the affirmative, Mr. Parke, because I do not remember.

Q. It might have been about the time you bought this milking machine.

A. I am not going to answer that question in the affirmative, [151] because, as I told you, when I had the milking machine, I had those places.

Q. Now, before you fixed these drinking troughs, you had what is known as mud holes, that is places where the cows drink?

A. Most of the cows drank out of the ditch—out of the irrigating ditch. A great many of them walk right into the ditch, and when they walk into the ditch the cow's udders and teats would get into the water.

As to what kind of a barn, or the condition of the barn, in which I did milking, and kept the cows, during 1913 and 1914, I say that I did not have any barn

(Testimony of W. W. Skinner.)

at all in 1913. For shelter for the cows, I had a shed about 40 feet square, right in the middle of my corral; the cows walked in under it; and when it rained the cows walked around in the mud. I take my water from this same common source of water supply. As to when I first began to put my cows into a stable and put them in rows and fasten them, I have not got any stable yet.

Q. When did you begin to tie your cows up?

A. Why, I didn't have this—I didn't have this barn finished—that is, all of the concrete work finished, when they put in the machine. Prior to the date I put the machine in, the cows stood around, under this little shed on the earth, right on the ground, during milking time.

Q. Where was the mud hole from which your cows obtained their drinking water before you built the concrete troughs?

A. I did not build any concrete troughs. I had galvanized tanks out of 2 by 12 boards. Before I put in the tanks from which to drink, a great deal of the time we run the [152] water fresh into the ditches and they drank out of that until I got prepared to build some tanks, and as soon as we built some tanks—I got the idea from seeing other people build these wooden drinking places—I commenced to build those. They were not a sort of space dug out from clay in which I poured water and in which the cows waded; I did not have what is ordinarily called a pond to drink out of.

Q. And there was no place in which water stood

(Testimony of W. W. Skinner.)

around in your place in which the cows waded, prior to the date you put in these tanks?

A. Now, when I began to dig the tanks, I began to dig the water places.

The COURT.—Q. Before you built these tanks, was there a place where the cows stood in the standing water?

A. Prior to the time I dug these tanks?

Q. Yes.

A. As I said before, we let the water into the ditch.

Q. Well, was it standing water?

A. The ditch would not hold it for a day; we had to run water in there every day or two.

Q. It wasn't fresh water; you run the water in and fill the ditch up again after it had dried up?

A. We had to run it in every day or two until we got some tanks built.

As to where I got water from with which I washed my milking machine and teat cups, after I had installed the milking machine, why, we got it from various places. We sometimes got the water that we—we invariably got the water that we put the teat cups in and washed those in, [153] we would some times get it from the ditch right across the road, and some times get clear fresh water—that is the best water in the valley. It is not out of the main canal, it is a neighbor's canal across the road; this water runs from the Colorado River into the Imperial Canal. Oftentimes I had a cistern on my back porch, and then I have got a settling basin to get my water for washing the cans, and washing everything

(Testimony of W. W. Skinner.)

generally, right by the separator house, and some times get the water out of that. If the water would, from any cause, begin to get low in the pond, we discontinued to use it until we could get in fresh water.

Q. So that near the pump-house then you had a sort of pond in which you ran water and let it fill up and from that you obtained water to wash your milking utensils?

A. Not the teat cups; we got the best water we could for that. Now, to wash those utensils, I believe my—I had my tank made to set right up by my engine and the exhaust pipe coming through it, and the exhaust pipe from the engine went into it, and then during the length of time the engine would run in milking and separating, why, that water would boil in there, and we would use that water to wash up the buckets and things that we had to wash.

Q. But the water at the time you washed wouldn't be so hot you couldn't put your hands in it?

A. Poured it into the buckets and utensils. My cows never had access to that pond by the pump-house. Occasionally, the gate might have been left open, and the cows run through there, like cows would. I would not attempt to say that cows never went into the yard, but that was fenced and the [154] cows were not permitted to go into that place and drink. Prior to the date when I put in the cement floor, which was approximately the date I got the milking machine, the cows had nothing except the earth to stand upon while they were being milked; I did not fasten the cows at all and the ma-

(Testimony of W. W. Skinner.)

nure from the cows was left in the yard in which they stood around, for a reasonable length of time. I wouldn't allow the manure to accumulate to a great extent. We would not clean it out every day; some times not for a month. In the Imperial Valley, the sunshine through one day's time will dry nearly anything, and it will be just as dry as it can be in a day's time. I would not say that I cleaned up the yard once a month; I should say some times it would be a month in the busy time.

I said that this machine would draw the milk out from the cows.

Q. And there was nothing wrong with any part of the machinery; so leaving aside now the question of its effect upon the cows, there was no complaint about physical operation of the machine, was there?

A. The machine evidently didn't operate right or it would not have hurt the cows; it did not work all right mechanically or it would not have hurt the cows; aside from the injury which I claim resulted to my cows, I would not have any complaint about the milker; if no injury had followed, if it operated for the purpose for which I bought it, I would have no claim.

Q. If it had not, as you claim, injured your cows, you would have been satisfied with the operation of the machine? What was mechanically wrong?
[155]

A. Your expert was there, and he didn't know. Why should I know. I don't know if there was anything wrong with the pump.

(Testimony of W. W. Skinner.)

The COURT.—Mr. Skinner, you don't know whether there was anything wrong with the machine or not, except you claim it hurt your cows?

A. That is all I could say; it hurt my cows.

Mr. PARK. Q. And aside from that,—you had no complaint except the effect it had upon your cows?

A. If the machine had milked the cows I would have been only too glad, if it had answered its purpose.

As to the upward symptoms of the cows when they became diseased, well, when those cows would develop those hard quarters, why, they would get into very bad condition; the cow would stand with her eyes and head drawn; she wouldn't get about much; her general physical condition seemed to be affected. It affected the udder first, but after the infection had been there for a few days, it seemed to have a general depression effect on the cow. The udder was swollen, and the cows act very much like the udder was sore to the touch. I judged from the manipulation that the udder was sore to the touch. There was discoloration of the udder; it looked bruised—the tender part of the bag, the bruised part of the bag; the affected part of the bag would look bruised; the trouble seemed to be—well, it looked bruised all over. There had not been any milk from the cows whose bags were affected.

Q. It was only in those cows where it was a very aggravated case, where there was no milk that came?

A. Those cows that were ruined, when the cows—the first [156] time it would develop on them,

(Testimony of W. W. Skinner.)

before we could take the machine right off, and we begin to massage those cows and care for them, then milk came from that. When the milk came out, it did not look like ordinary milk; it looked spoiled, and after a while it was thick; and after a length of time, there was a cheese-like substance came out of the cow's teats in little lumps.

Q. You mean after the diseased condition had progressed to a certain extent, then there would be little cheesey substances come out, like clabber?

A. It would work out in the teat, and you can go to the cow then to care for it; it would be just as if it were an old sore, and try to run and try to get out. The pus came from the teats from some of the cows. There was an odor to the milk after the cows got into a certain state; there was nothing sweet about it.

Q. Was the first strippings sort of a watery like substance?

A. Why, when the—you could go to the teat and just squeeze and squeeze in that way, and you could get a little kind of a bloody, watery lot of stuff like that, and then you could come and you could pull like this and strip it. If anybody ever milked any cows they could get stuff out of that that they couldn't squeeze out this way, and then you could get that stuff out of it; you could strip some of it out. I never had any of the milk examined by any of the veterinaries. When Mr. Briggs was there he asked me if I had any objection to his taking some of that stuff out of one of those cows to have it tested.

(Testimony of W. W. Skinner.)

They wanted to straighten the thing out and find out if they could what was the [157] cause of the machine hurting the cows that way. They wanted to straighten it out, and he asked me if I had any objection, and he went to an old cow in October that had been ruined since July, and got some of the stuff out of there in a little bottle; what he did with it, I don't know. I never had any veterinary make any bacteriological analysis of any of the milk.

When a cow had a diseased or caked udder, I administered treatment; I used Mr. Cram's treatment. When he was there, before Mr. Reed came there in the summer, I had absolute control of these things myself. Up to the time Mr. Reed came there in June, I had 30 cows I wouldn't dare milk with the machine. I had never ruined any cows permanently until Mr. Reed came in June. I used bag balm, and I used grease and massages and hot water, warm water, and bathed them and massaged them, and we got some bag balm, they call it. We worked that so far and got the milk to where they were not totally ruined. After a cow received one of those swollen quarters, she never did come back normal, even though you took her off and put her on hand milking, the milk would come, but she would never come back any more to what she was before that happened.

Q. Did you ever notify the Sharples Separator Company, or make any complaint direct to any of the officers of the Sharples Separator Company with

(Testimony of W. W. Skinner.)

regard to the damage which you claimed you were suffering?

A. After I discontinued the use of the machine, I did, to Mr. Frank; Mr. Edgar Bros. was right there and we were in close touch with one another; I would notify Mr. Edgar Bros., and he would pass the communications to the Sharples [158] people.

The COURT.—Your complaints then were made to Edgar Bros.—you made your complaints to Edgar Bros?

A. Yes, sir; I made my complaints to them. I made complaints to Reed or Briggs. When I would make my complaints to Edgar Bros., it would be when Reed or Briggs was not there, and they said they would notify the Company—well, they appeared on the scene. Briggs appeared on the scene afterwards. When Mr. Briggs came in the fall, I had not notified anybody then. Mr. Edgar and I had talked it over at different times and Mr. Edgar told me he had been in communication and touch with them, and in order to try to get it adjusted and get my money back, he had talked in general conversation at different times. When Mr. Briggs came on the scene, I never knew about his coming; I did not know how he came or when he was coming, until he got there.

I do not think it is true that, before the diseased condition, the machine, when it milked the cows, got practically the same amount of milk I got by hand milking. When one of those cows would become inflamed, she never would give the same milk any

(Testimony of W. W. Skinner.)

more. Before she got the swollen udders, she would not give as much milk with the machine as if I had milked it by hand. I have no way of estimating how much less milk she would give. As to whether I could swear positively that I did not get as much milk before the diseased condition appeared, well, I would say that—I would say this, that up to the time these troubles began to appear, why, the cows were on the increase. The cows were on the increase for this reason—it was the spring of the year; I installed it the first of February, [159] and February was always the shortest month, and the cows more than begin to—more than give—they begin to give more milk, and they begin to come in, and our milk would naturally increase under natural conditions.

Q. Now, if no diseased condition had appeared among your cows, you would have been satisfied with the milking machine, so far as extracting the milk from the cow was concerned?

A. (Mr. PARKE.) I did not have experience enough with the machine to answer your question definitely; I did not have enough experience with the machine. The only way you could determine that would be through a season. You milk cows through a season, and if they hold up as they would have through the hand milking, undoubtedly, I would have been satisfied; if not, chances are that I would not.

As to what I mean by the quantity of butter fat which I took from the cows, well, the butter fat does not indicate butter, or the pounds of butter; butter

(Testimony of W. W. Skinner.)

fat is the cream that comes out of the milk after it goes through the separator; it separates the skimmed milk, as we call it; it takes the fat out of the milk; that fat is what I sell to the creameries, and the skim milk is what I feed the pigs and hogs and calves,—we utilize the skimmed milk.

Redirect Examination.

I went to Mr. Edgar and told him that I wanted another milking unit, and he ordered me a milking unit. Briggs took the samples that I have referred to from a cow that was hurt in July; he got the samples in October; they [160] had not given any milk prior to the time he got the sample, not since July. The cows that I referred to when answering Mr. Parke were those that were injured with the milking machine; it was those cows that had been taken off the machine from some—from the small damage, and we had worked them out, and we milked them by hand. We had succeeded in reducing that swelling by milking by hand.

Q. Was there any evidence of any inflammation or swelling or hardness in those quarters at the time Reed came back, on those cows which you had been milking by hand.

A. Well, I couldn't say, Mr. Swing. Mr. Reed knew why we had taken those cows off, and we had succeeded in reducing them down to something like normal. At the time Mr. Reed installed my machine and instructed me in the operation of it, he did not suggest any changes to be made in the sanitary conditions which surrounded my dairy; when I first in-

(Testimony of W. W. Skinner.)

stalled the machine, I had concrete for the cows to stand on—I had concrete gutter, and I had a 2 by 12 runway between the gutters. The cows' heads stood out and their tails together, and we had a runway for the cows to come in, as we call it, and worked up and down with the milker. Those were made of 2 by 12 at first; the gutters were concrete and the sides were concrete. On one side of the stanchions the gutter, we had to slit it in after the cows had gone into the stanchions. We began to use the stanchions—we installed the machine before I got the barn really finished, and we did not get this gutter as good as it should be, and after using it for a while the cows began to break it, and Mr. Reed was there, and he said, "Mr. Skinner, if you will just take two by twelves, it [161] will fill the gutter, and let them run those; we can clean it out." He did not suggest any other changes in the conditions there. I operated the machine under the same conditions under which he operated it. He did not wash the teat cups in any different water from what I washed them—I mean water from any different source. I just simply followed out what he showed me.

Recross-examination.

When Mr. Reed went down in October, he only used two units at a time on the 30 that were set aside, and the other two units were not used; Mr. Reed may have used all four of them; I don't know which ones he did use.

Testimony of Aubrey Skinner, for Plaintiff.

Thereupon, said plaintiff called AUBREY SKINNER, as a witness in his behalf, and said Aubrey Skinner having been first duly sworn, testified as follows:

Direct Examination.

I am a son of the plaintiff, who has just left the witness-stand. I am 21 years of age. I live at El Centro, California; and I have been living with my father ever since I was born. I was familiar with the dairy herd that my father had there. After the milker was installed, it was operated by myself and the other hired man. I got my instructions from my father. Sharples' man, Reed, instructed us; he was there instructing us about two weeks, and at the time he went away he said he thought we were all right. He came back afterwards, three times. I do not recall any suggestions or changes which he asked me to make in the way he found me milking when he came back those other times. I had a book of instructions, and I followed [162] those instructions. I operated this milker in the method that I have described for possibly a month before I observed any change in the conditions of the cows; then I noticed that the cows started to come in with hard quarters; and I took them off and milked them by hand, and the result was that the cows returned to normal, except that they did not give as much milk. From the time I started milking, one string of cows, or 30 cows were taken off the milker at one time or another. When Reed came back there on June 25, he

(Testimony of Aubrey Skinner.)

put them all back on the machine. I and the hired man assisted Mr. Reed in milking during June. I got my instructions from Reed. I put the milker back on all the cows; the string of cows that had been injured before and which I had been milking by hand, started coming in with hard quarters again, but worse this time; some of them had three quarters, and some of them all of them. Between June 25th and July 7th, we had 14 cows in the hospital as we called it, and then there were more that were not so bad and were left in the corral with the rest of them. The 14 that were in the hospital did not give any milk, and did not give any more that year. Reed left there a few days after the 4th of July; he said the Sharples Separator people called him back. The milker was not continued in operation after he left; it remained in disuse up to October 20th. In October it was finally started on a bunch picked by Mr. Briggs and Mr. Reed; there were no cows in that bunch that had been injured before; Briggs stayed there after the first milking, and I think he came back a time or two after that; Reed stayed until about Christmas, I think. I went away that fall; I think I left on the 5th [163] or 7th of December; up to the time I went away, the effect of putting the milker on this new string of cows that Reed picked was that there were seven or eight that had hard quarters—I would not be positive. I came back some time in February, 1915, and have been there since. Since I came back, the cows have been milked by hand, and are being milked by hand now. After

(Testimony of Aubrey Skinner.)

I stopped using the milker, and since I have been milking by hand, there has not been a single cow of swollen quarters appear in my herd. Prior to February, 1914, we had been milking this herd of cows by hand ever since we had them—two years, I think; and prior to the time the milker was put on, I had not seen a swollen quarter in the cows I had milked.

Cross-examination.

I did not operate the machine from the time it was installed continuously until Mr. Reed came down there in June—for the period of all of February, March, April, May and June and up to June 25th; when we got that bunch of cows with hard quarters, I started to milking them, and the other fellow used it.

After we began milking the cows with the milking machine, the cows began having swollen quarters for the first time in about a month. As soon as they developed swollen quarters, we took them off and milked them by hand; and when we did that, well, I would not say she got all right, but it looked like she was; she did not give as much milk as she did before the swelling was begun. I did not put the machine back on that same cow again. But it was later on in June when Mr. Reed came down. Up to the date [164] when Mr. Reed came down there, we had about a string, or about 30 cows with affected quarters. And among those were cows from which the flow of milk later entirely stopped. When I milked the cows, I drew from the teats of the cows a couple of squirts of milk before I put the teat cups on. I

(Testimony of Aubrey Skinner.)

did that in every case; I stripped the cows after they were milked; and it would be two or three minutes, I guess, after I took the teat cups off that I stripped the cows. I did not make any adjustments or attempt in any way to regulate the use of the machine, the pressure and the vacuum; we followed instructions; that was all we knew about it. By following instructions I mean we did what Reed told us, and I saw in the book there. I did not make any adjustments as to the amount of pressure and vacuum on one cow and on another cow, but milked them all with the same amount of pressure and the same amount of vacuum. As to the pulsator, I made changes when I changed from one cow to another—adjusted that little thing in the pulsator. When I was milking a hard-teated cow, I did not make any adjustment on the pulsator; it says when they get red, why, turn that little outfit off; and I would wait until the teat got red before I turned that off. We had to wait until it got red the first time to see whether it would do it or not.

Q. But you would not know until you took it off, of course, whether it was red; now, the next time you milked that cow, would you milk with less pressure?

A. More pressure, wasn't it?

Q. Well, which was it? [165].

A. More pressure; I would use more pressure. As to the vacuum, when I found that the milking machine was causing red teats, I let the vacuum stay as it was. I made that adjustment on the pulsator as I

(Testimony of Aubrey Skinner.)

changed from one cow to the other, but not between every cow.

Redirect Examination.

I know what this sign is (referring to enameled sign); it is instruction; it came with the milking outfit; this was kept hanging up in the barn where the cows were milked.

Testimony of Mrs. Ida Skinner, for Plaintiff.

The plaintiff thereupon called Mrs. IDA SKINNER as a witness in his behalf, and said Mrs. Ida Skinner having been first duly sworn, testified as follows:

Direct Examination.

My name is Ida Skinner; I am the wife of the plaintiff in this case; I have been living on the dairy during the time my husband has been living in Imperial Valley. I am familiar with the string of dairy cows owned by my husband; at that time, before we got the milker, I had milked most every cow in the corral. That milker was sold to my husband and installed in February, 1914. It was installed by Mr. Reed, who stayed at our home while he was installing it; he was there about two weeks. Besides simply installing the machine, he milked the cows and instructed our son and Harvey Allen to use the milker; and at the time he left he said he thought they were perfectly capable of running it. He was back there after that a number of times—three, I believe; and when he came back he said [166] they were operating the machine all right. I never heard of his making any suggestion of any change in the

(Testimony of Mrs. Ida Skinner.)

method in which they were operating it. After the milker was started I still kept in touch with the dairy cows, and noticed a change in the cows after the milker was put on them—about a month or six weeks after; I noticed the swollen quarters—hard quarters; as to the number of cows I saw with swollen quarters down to the time that Reed came back on June 25th, it must have been a string—what we call a string. When cows developed swollen quarters, we took them off the machine and milked them by hand; that had the effect that they always seemed to get better. When Reed came that day we had a string milking by hand which had been injured. As to the occasion of Reed coming back there on June 25th, Sharples people sent him down; when he got there he put the machine back on the cows. No one there attempted to exercise supervision over him; he took charge; he put the machine on all the cows, and ran it about two weeks. I observed the effect of the milker to be the same—hard and swollen quarters; the cows were ruined; there was, I think, 17, if I remember, out of the corral, and then more that were injured in the corral. Mr. Reed had a veterinary come out at that time, and they used a treatment; and then Mr. Skinner had a man to attend to the cows, and especially to those cows—not to do anything else. At this time, some of the 17 did not give any milk at all; they were too bad; but there were some that gave a substance,—I don't know whether you would call it milk or not, you would not take the milk from them to use. If one quarter were affected, it would not affect the

(Testimony of Mrs. Ida Skinner.)

other quarters; [167] just that quarter alone would be affected; each quarter is independent of the other. As to the 17 cows that I have referred to, in some of them all of the quarters were injured, and some less, but I do not remember just how many, how many of each quarter of each cow. From those 17 cows, we were not using the milk to take to the creameries.

The COURT.—Wasn't using the milk out of any one quarter or not?

I don't think so, of the 17. After Reed left in July, the machine was not operated by my husband or my son; none of my folks started it up again after that; it was started by Mr. Reed. From July to October, that machine was not worked on our place; during that time, none of the cows got diseased; there were no new cases of swollen quarters during that time. In October Mr. Briggs came down. Mr. Skinner did not want to start the machine, and I was very bitterly opposed to it, but he finally started it under that written paper.

Mr. SWING.—Q. Was it started before or after that written paper was signed by Mr. Briggs?

Mr. PARKE.—We object to that. There is no evidence of a written contract of any kind.

The COURT.—Objection overruled.

Mr. PARKE.—Note an exception.

EXCEPTION NUMBER 16.

And said defendant, Sharples Separator Company, a corporation, now assigns said ruling as error.

The WITNESS.—After. Briggs was there for

(Testimony of Mrs. Ida Skinner.)

one milking after Reed came, and then a time or two after. Briggs helped Reed to sterilize everything and get it milking. [168] Reed operated it from October until just after Christmas; and while the machine was being operated, something like 7 or 8 cows, I think, of swollen quarters developed; during that time no new cases of swollen quarters developed among the two strings that were being milked by him. As to what cows Briggs and Reed put the milker on when they started on October 20, they selected a string of good cows; I think they were mostly young cows that had not been used on the milking machine before. Some of these cows had had their first calf. I do not know how many. As to what was the occasion of Reed's quitting on December 20th, why, when he came into the kitchen—he always came into the kitchen where I was; when he came in, he said he was not going to put the milker on another cow, and I wanted to know why, and the words that he used was that he had ruined the last cow for us with the milking machine that he was going to.

No cross-examination.

**Testimony of W. W. Skinner, Recalled in His Own
Behalf.**

Thereupon the said plaintiff was recalled as a witness in his own behalf, for further redirect examination, and testified as follows:

Mr. SWING.—Q. At the time, Mr. Skinner, you purchased the three units from Mr. Hickson representing the Sharples Separator Company what if anything was said by him as to the manner or way in

(Testimony of W. W. Skinner.)

which you could purchase another unit if you so desired?

Mr. PARKE.—We object to that as incompetent, irrelevant, immaterial and already testified to.

The COURT.—Objection overruled.

Mr. PARKE.—Note an exception.

EXCEPTION NUMBER 17. [169]

And said defendant, said Sharples Separator Company, a corporation, now assigns said ruling as error.

A. Why, Mr. Hickson was there with Mr. Edgar's man, and he told me any time I wanted another unit I could either order it through them or notify Mr. Edgar, and they would get the unit for me.

Recross-examination.

I went to Mr. Edgar and he ordered the fourth unit for me; there was nothing said about paying for the unit; I just told Mr. Edgar to order the fourth unit for me, and he did; this fourth unit was charged to me by Edgar Bros. from whom I have received statements for it. I did not communicate with any officer or employee of the Sharples Separator Company when I bought the fourth unit,—I communicated with no one except Edgar Bros.; I never received any bill from Sharples Separator Company for the fourth unit.

Mr. SWING.—The plaintiff rests.

Thereupon, the defendant, Edgar Bros. Company, demurred to the evidence and moved for a nonsuit, which demurrer was by the Court sustained and nonsuit granted.

Thereupon, the defendant Sharples Separator Company, a corporation, made the following motion :

We desire to move for a nonsuit on the ground that it appears from the evidence that the damage, if any, suffered, even under the testimony of the plaintiff, was from an indiscriminate use of the four units. And it further appearing from the evidence that one unit was purchased from Edgar Bros. and three from the Sharples Separator [170] Co., and no evidence having been introduced and no basis upon which the jury or the court could arrive at the damage, if any, which ensued from the three units purchased from the defendant, Sharples Separator Company, or the damage which resulted from the unit purchased from the plaintiff by Edgar Bros. Co. Upon the further ground that the testimony, as offered by the plaintiff, is not sufficient to support a verdict in his favor, there being no showing that the milking machine caused any damage to the cows.

The COURT.—I will overrule your motion. Exception granted.

EXCEPTION NUMBER 18.

And said defendant, Sharples Separator Company, a corporation, now assigns said ruling as error.

Thereupon, said defendant Sharples Separator Company, a corporation, made its opening statement to the jury and proceeded to introduce evidence upon its behalf as hereinafter follows:

Deposition of Dr. Walter J. Taylor, for Defendant.

The deposition of Dr. WALTER J. TAYLOR, a witness for and in behalf of the defendant^a Sharples Separator Company, a corporation, was then introduced and read in evidence. Said deposition is as follows:

Direct Examination.

My name is Walter J. Taylor. I am a legal resident of the State of California, and at present am located at Cristobal, Canal Zone. I am investigating an outbreak of anthrax among beef cattle of the supply department of the Panama Canal. I am a veterinarian by profession. I have [171] been engaged in the profession of veterinarian for ten years. I was educated at the New York State Veterinary College, Ithaca, New York, taking a three-year course. I taught in the Veterinary College two years after graduation; then one year as first assistant State Veterinarian for the State of New York; was professor of veterinary science at the Montana State Agricultural College; was assistant professor of veterinary science in the State Experiment Station, Berkeley, California, being located at a branch experiment station at El Centro, Imperial County, from September 1913, to September, 1915; and veterinarian for the Miller & Lux Company, Inc., at San Francisco and Los Banos, California, from September 1, 1915, to August 1st, 1916. I am at present investigating an outbreak of anthrax among beef cattle of the Supply Department of the Panama Canal. I was connected with the University of California for

(Deposition of Dr. Walter J. Taylor.)

two years as assistant professor of veterinary science, engaged in extension and research work, divided between Berkeley, California, and the branch experiment station at El Centro, California. While I was so connected with the University of California, I was connected with the branch experiment station as veterinarian from September 1, 1913, to September 1st, 1915, the work consisting of extension work, and the investigation of animal diseases, particularly those occurring in Imperial County. This work was conducted at the branch experiment station of the University, located at El Centro. I once met Mr. W. W. Skinner who lives near El Centro in Imperial Valley, California, at his ranch, near El Centro—the date I do not recall. I met him at his ranch for about half an hour and have never [172] seen him since. I lived in Imperial Valley, California, from September 1, 1913, to September 1, 1915, being engaged as veterinarian to the branch experiment station of the University of California, located in the valley. I have visited the dairy farm ranch of W. W. Skinner near El Centro, California; I do not recall the exact date; I visited the farm at the request of Mr. Briggs, a representative of the Sharples Milking Machine Company; the purpose of my visit was to examine some cows affected with udder trouble. The cows that I examined belonged to W. W. Skinner; I examined four cows; the udders of each one of these four cows were examined by manual manipulation in order to determine the presence of congestion or other pathological condition that

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might be present. I took milk from the bags of Skinner's cows. Each one of these four cows was affected with mammitis in one quarter of the udder and a sample of milk was taken from each cow, from the affected quarter. I took about two ounces of milk from each one of the cows, the milk being drawn into sterilized wide-mouthed bottle of the above-mentioned capacity. It was drawn by hand milking. These samples of milk were taken to my laboratory at the branch experiment station, and smears made from each one, stained, and examined under the microscope. Cultures on Agar plates were also made from each sample, and after 24 hours incubation at 37 degrees Centigrade, sub-cultures were made upon slant Agar medium, in test tubes from numerous bacterial colonies appearing upon the Agar plates. The Agar plates showed bacterial colonies of several forms of bacteria, including motile and non-motile rod-shaped organisms; also numerous colonies of coccoid organisms, presenting a lemon-yellow color in [173] growth. The latter form of organism was present in large numbers. Several of the colonies referred to were marked and by the use of the sterilized platinum needle they were transferred on Agar slant mediums in test tubes by the streak method of inoculation. The result showed that the yellow micrococcus was the predominating form of organism.

At the time I took the samples of milk from Skinner's cows, Mr. Skinner was present, Mr. Briggs, and several of Mr. Skinner's milkers, names

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unknown to me. There was one other party present, whose name I do not recall, who went out with us in an automobile. I took samples of milk from four cows. While I was at the Skinner ranch, I did not make it a point to observe the sanitary conditions about the Skinner ranch, but noted that they were about on a par with the majority of dairies in the Imperial Valley; the only point that I remember distinctly was that the barnyard was very muddy; and I noticed that this muddy condition of the premises caused more or less muddying of the bodies and legs of the cattle. The cows at the Skinner ranch were not groomed, the animals being milked showed the same condition already noted, that is to say, the bodies and legs had more or less mud on them. I did not observe anything further than the conditions just referred to. I did not make a definite note in regard to the condition of the udders and teats other than those examined from which the milk was drawn; the four cows that I examined showed loose dirt upon the udders, and each cow had one diseased quarter. As to the condition of the Skinner barn and barnyard, I made no observation other than that already mentioned, that is, that the barnyard was muddy and [174] that there was more or less mud on the bodies and legs of the cows. I made no observation in regard to the drinking water of the cows, nor as to the sanitary or unsanitary condition of the water supply; but I did observe the water supply used for washing utensils. I made no special observation in regard to the drinking water. I did

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not see Skinner wash any of the utensils used in connection with the milking machine on his farm. After observing the water used in washing the milking utensils, I asked Mr. Skinner if this water was boiled before being used, and I do not fully recall his answer, but my impression is that he said that it was simply heated and not brought to the boiling point. In order to properly sterilize articles washed therein, the water should be brought to the boiling point, or to 212 degrees Fahrenheit. I did not take any samples of water from the Skinner farm. I had no conversation with Mr. Skinner as to the place from which the cows obtained their drinking water. Mr. Skinner pointed out to me the settling basin from which the water was obtained to wash the parts of the machine. He simply said to me, "The water is settled in this basin and used for washing the milking utensils. "I did not take any samples of the water. All the water used in the Imperial Valley west of the Alamo River, comes from the Colorado River; this water supply is very heavily laden with silt, and has to be settled before being used. I took no samples of water from the Skinner ranch, and therefore did not make any analysis. I never took samples of any other water in Imperial Valley, or made any chemical analysis thereof, but I did make a bacteriological analysis of the general water supply of [175] Imperial Valley. I made no chemical analysis, but made bacteriological analyses of water obtained from the following sources: The Date Canal, tap water from the El Centro

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Hotel, and filtered water from the Dunniway Drug Store. I made no chemical analysis, therefore, I had no chemical results. The bacteriological analyses showed large numbers of organisms of the yellow micrococcus variety, the morphology of which, as well as their cultural characters, were identical with those obtained from the udders of the Skinner cattle. I do not recall the number of these organisms, per cubic centimeter of water, but will state that they were more numerous in the water from the El Centro Hotel tap than from the Date Canal water and the filtered water from the Dunniway Drug Store. The micrococcus found in both the milk taken from the Skinner cows and the water taken from the sources already mentioned, were identical in morphology, cultural and biochemical properties. The rod-shaped motile and nonmotile organisms mentioned as being found in the milk were not encountered in the water.

I have treated cases of mammitis in cows. My experience shows that if the trouble be of an infectious nature the treatment should be administered internally through the teat of the cow by antiseptic washes, that is, the udder should be flushed out, so to speak, with an antiseptic solution, the outside of the teats also treated with an antiseptic solution; but if the mammitis is not infectious, it may be treated by the internal administration of medicines per orum; or locally upon the external surface of the udder. There is more than one kind of mammitis. There are two forms, known as infectious and

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sporadic. The infectious [176] mammitis is so called from the internal invasion of the mammary gland by an invading organism. Sporadic mammitis may be caused by congestion due to a traumatism or a general fevered condition of the animal, such as sometimes arises shortly after calving, and produces what is commonly called "caked udder" and "caked bag." These two forms of mammitis present practically the same outward symptoms, but the infectious mammitis is characterized by the presence in the udder of some kind of an invading organism, and it is spread through the herd from one cow to the other. Sporadic mammitis generally affects one animal or possibly two in a large herd, is not characterized by the presence of invading organisms in the affected udder and does not spread from animal to animal. I made no chemical analysis of the milk taken from Skinner's cows, but the bacteriological examination showed that they were affected with mammitis. The udders of the cows may be infected with mammitis. I consider that the bacteriological examination which I made of the milk drawn from the four cows owned by Mr. Skinner showed that they were suffering from infectious mammitis, due to the presence of large numbers of micrococcus already referred to. I examined the udders of each of the four cows from which the milk was drawn. As already stated, one quarter of the udder of these four cows was affected with mammitis, the affected quarter being somewhat swollen, congested, hot and tender to the touch, and one quarter especially noted upon one

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of the animals contained a necrotic focus, a portion of which had sloughed out, producing a pit, from which pus was discharging. At the first attempt to draw milk from each one of these affected quarters, only a watery [177] substance resembling whey was obtained, but upon manipulation of the udder a thick, semi-solid cheesey mass was obtained. As before stated, the first drawing of the milk was of a watery nature resembling whey. The milk drawn from the affected quarter had a sweetish, sickening odor. Not knowing just how long this condition had persisted, it is not possible for me to state what the cause of the condition was. From an examination of the milk drawn, my opinion is that the condition of the udders at the time of my examination was largely due to the presence of the invading organisms already referred to. In my opinion, the diseased condition of the udders of these cows had not been properly treated, due to the fact of the sloughing in the one case already mentioned. If suitable antiseptic washes had been administered at the onset of this trouble, I do not think the condition that I saw would have been present at the time I made the examination. I do not think that the condition which I observed in the udders of these cows could have been produced by injury, unless the injured member was badly neglected and no treatment given. In my opinion, infectious mammitis can be transferred to or communicated from one cow to the other by hand milking. The proper precautions to take in order to prevent the spreading of infectious

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mammitis from one cow to the other when they are being milked, either by hand or by machine, would be as follows: Isolate the affected cows and milk them last after all the healthy cows had been milked either by hand or by machine. The teats and udders of the affected cows should be washed with an antiseptic solution, the hands of the milker or the cups of the milking machine sterilized after milking the healthy cows and before milking the diseased [178] cows, as well as between the milking of each one of the diseased cows. I understand that the Sharples Separator Company's milking machine milks the cows by a process known as the "vacuum process"; other than that I do not know the *modus operandi*. The Sharples Separator Company's milking machine could not, of or in itself, generate or cause infections mammitis, unless proper care as to washing and sterilization was not taken with the teat cup. It is not possible to mechanically produce infections mammitis. As to whether I had any conversation with W. W. Skinner in relation to his treatment of the diseased condition of his cow's teats and udders, I do not recall specifically, but it is my impression that Mr. Briggs, in my presence, asked Mr. Skinner if he was treating these affected cows. He replied that he was not.

Traumatic mammitis is a mammitis produced by a traumatism, otherwise known as an outside injury. The proper method of treating traumatic mammitis is by local application on the outside of the affected udder, using agents to reduce the congested condi-

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tion. The proper manner of treating infections mammitis is by irrigating the inside of the udder with a standard disinfecting solution of some sort, with the object in view of destroying the invading organisms. Sporadic mammitis should be treated according to the condition which gives rise to it, as more fully explained hereinbefore. One cannot tell from an external observation whether the diseased condition was sporadic or infections mammitis; one could determine whether the diseased condition was sporadic or infections mammitis from the history of the conditions, and a bacteriological examination [179] of the contents of the affected udder. I saw nothing that would indicate that the teats and udders of Skinner's cows were being treated, and in answer to a question propounded by Mr. Briggs, Skinner answered that no treatment was being given. In the case of a herd of cattle where some of them were infected in the way Skinner's cows were infected, I would advise that the use of the milking machine be discontinued, at least until a differential diagnosis, had been made to ascertain whether the mammitis was infectious or sporadic. If a milking machine were used upon a herd of cattle where some of them were infected in the way Skinner's cows were infected, this precaution should be taken, that the affected cows should be isolated and milked last, with adequate sterilization of the teat cups between the milking of each cow, and before being used upon healthy cows after using upon diseased cows. From my examination of the milk,

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teats and udders of Skinner's cows, I do not think that the diseased condition which I found was caused by the use of the milking machine: I do not think so from the fact that the examination of the milk showed an infectious mammitis, as heretofore stated that the milking machine could not cause the diseased condition which I observed at the time of my examination.

Cross-examination.

I examined four cows on the Skinner place, paying particular attention to the diseased condition of the udders of these cows, noting just what the diseased condition was. I was at the Skinner ranch about 30 minutes; I took samples of milk from four cows, and each sample was [180] kept separately. I do not consider that the Skinner Dairy was on the whole above average of Imperial Valley Dairies for general sanitary conditions. I do not recall the date on which the visit was made to the Skinner ranch, and so stated to Mr. Smith at the Claus Spreckels Building. I do not know how long after Skinner had abandoned the Sharples milker that my visit was made; he was not using the milking machine at the time of my visit. I made the statement to Mr. Smith, attorney for the Sharples Separator Company, at the Claus Spreckels Building, San Francisco, that I would not want to say that the udders and teats of the cows belonging to W. W. Skinner were dirty, because I do not remember very distinctly in regard to that; and as referred to in direct questions, I do not recall that they were what might

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be called "dirty"; they had more or less mud upon them. As I recall, it was after a rain that I visited the Skinner place, but the rain had not been sufficient to produce as much mud as was in the barnyard. I made no particular note of the condition of the barn, but as far as the barnyard is concerned, my observations were such as recorded in direct examination. I do not recall positively of observing the sanitary condition of the barn. I did state to Mr. Smith that I did not see any utensils washed in water from the cistern, which is a fact. I cannot say that Mr. Skinner had abandoned the use of the Sharples mechanical milker at the time of my visit to the Skinner ranch, but he was not using it at the time of my visit. It is a fact that I did not take samples of water from the Skinner place; the water that was examined by me was gathered by another person, but the places where the samples [181] were taken were mentioned in my direct examination. This analysis of water was made by me about a week or ten days after the visit to the Skinner place—I do not recall positively. I made the statement after examining the milk from Skinner's cows that in my opinion they were not suffering from infections mammitis; at that time it was my understanding that infections mammitis was caused only by streptococcus; later, I was informed by the dairy bacteriologist that infections mammitis could be caused by micrococci or other pus-forming organisms. I made practically the same statement to Mr. Smith. If the presence of a pus-forming organism in the udder of

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an infected cow determines whether the mammitis present is infectious or not, and I think it does, these cows were suffering from infectious mammitis. The presence of any pus-forming organism, to which class these organisms, micrococcus or micrococcus citrus belong, would be considered as an infection, and would determine whether the mammitis were infectious or not. In my opinion, the findings in this particular case would indicate the presence of infectious mammitis. The micrococcus or micrococcus citrus, are found in small numbers where there is no infectious mammitis. I did not find any streptococcus on my examination of the milk taken from Skinner's cows. It is a fact that after the teats and udders of a cow have been injured, they then offer a more fruitful field for the invasion of diseased germs. In all healthy cows there are present in the udder various forms of organisms known as the bacterial flora. Ordinarily, these organisms produce no harm. In some instances such organisms will set up more or less inflammatory [182] condition following a traumatism. Such condition would ordinarily be overcome by a healthy cow and not by a diseased cow. If the Sharples Separator Milking Machine caused irritation and inflammation in the udders of these cows, they would be more susceptible to the invasion of organisms producing infectious mammitis. I did make the statement to Mr. Smith that I could not make a statement as to what the cause was, that I did not know what the cause was, but it was my impression that Mr. Smith's question

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at that time was as to the original cause, that is, whether in my opinion the Sharples Milking Machine caused this condition or not. I told him it was my opinion that the condition started from an external injury, with a subsequent invasion of bacteria. At the time I visited the Skinner place, the injured cows were separated, standing by themselves in the barnyard, while the remainder of the cows were one string in stanchions and the other string in another yard. They were not isolated under fence from the other cattle or kept from the rest of the herd under separate enclosures. I do not know whether Mr. Skinner knew who I was or what my mission was at the time of the visit or not. The only conversation I recall having with Mr. Skinner was in regard to the settling basins for the water. I do not know that he knew who I was or what the purpose of my visit was. I was introduced to Mr. Skinner by Mr. Briggs as Dr. Taylor of the Experiment Station. Mr. Skinner did not ask, and I offered no suggestion as to the purpose of my visit.

Testimony of Dr. George H. Hart, for Defendant.

Thereupon, Dr. GEORGE H. HART was called as a [183] witness on behalf of the defendant, Sharples Separator Company, a corporation; and said Dr. George H. Hart having first been duly sworn, testified as follows:

Direct Examination.

My name is Dr. George H. Hart; I am a veterinarian; I am city veterinarian for the city of Los Angeles at the present time, and have been such since

(Testimony of Dr. George H. Hart.)

November 10, 1910—six years.

The COURT.—Any question about his qualifications, Mr. Swing?

Mr. SWING.—No.

The WITNESS.—(Continuing.) I am acquainted with the various diseases of cattle, particularly diseases of the udder. Mammitis is the general term covering all forms of inflammation of the udder; it is generally considered an inflammation of the udder. There may be different kinds of mammitis; they may be divided into garget, or caked udder, mammitis or sporadic mammitis, and infectious mammitis. Traumatic mammitis would be classed as sporadic mammitis. To distinguish between these two direct troubles requires a history of the case, sporadic, traumatic or ordinary mammitis usually affecting one animal or two animals, while infectious mammitis usually affects a number of animals. In order to further make the distinction between the two, you make a bacteriological examination and try to find the organisms that are causing this disease, there being a number of organisms which are known to be associated with infectious mammitis in cattle. The organisms which are conducive to infectious mammitis are the streptococcus [184] pyogenes, staphylococcus pyogenes aureus and stephylococcus pyogenes citrus; they are the micrococci which are the cause. These are also paratyphoid of the bacilli type, being long rod-shaped organisms. The micrococoli is the general term of all round bacteria, bacteria that are circular

(Testimony of Dr. George H. Hart.)

in shape when seen under the microscope. Should they happen to be connected and chained, end to end, they are called streptococci. Where there be irregular cultures, with no grading in shape, they are simply called staphylococci. The ordinary causes of mammitis are very general. They are classed as changes in weather, the lying with the udder against a cold surface, the lying with the udder in the damp ground, or digestive disturbances, overfeeding and not complete milking of the cows are among the general causes of mammitis. Garget, or ordinary mammitis, can result from hand-milking. In hand-milking, if the cattle had been milked during a short period by a number of different men, and particularly if they were men who were not interested in their work, and do not thoroughly milk out the cows, the *the* cows are being fed heavily and not thoroughly milked, the simple fact that the udder is not being entirely stripped of milk, may in this case set up forms of mammitis. If the milker is rough in handling the cattle, he can set up a mammitis. To settle the diagnosis of infectious mammitis requires the presence of organism in the udder; no milking machine, nor any mechanical process, nor hand-milking, can cause or create this organism. It is not possible to mechanically produce infectious mammitis—not without the presence of the bacteria: bacteria may come from the hand of the milker, or [185] from the teat cup of the milking machine, or from a pond in which the cows are allowed to walk through, or may be in the corral in which they

(Testimony of Dr. George H. Hart.)

are allowed to lie down,—the same as any germ of any disease might get into the system.

Q. If a number of Mr. Skinner's cows that had hardened udders, inflammed udders, that were sore to the touch, and the quarters of the udder became discolored, and the milk coming therefrom was watery, and cheese-like substances came out when the teats were pressed, and the milk had a very strong or different odor from ordinary milk, and if samples of milk taken from the cows with the bags so affected was submitted to a bacteriological test, and the milk being taken in sterilized bottles, and smears made and the smears stained and examined under a microscope, and cultures made therefrom, and the cultures were developed through incubation, and thereafter the bacterial cultures were transferred by the use of the sterilized Agar mediums in test tubes, what disease would you say was present in the udders of the cattle from which the samples of milk were taken?

A. The fact that there is a yellow micrococcus present,—the bacteriological book does not seem to have named the micro,—but the fact that it is yellow proves it is staphylococcus pyogenes aureus, or the staphylococcus phyogenes citreus, or the streptococcus pyogenes. If he meant a golden yellow, he means the aureus staphylococcus. If he meant yellow he means citreus coccus, and they are the only two organisms of a yellow color in milk or Agar slant medium, therefore, these organisms are associated—these organisms are known to be associated with in-

(Testimony of Dr. George H. Hart.)

fectious mammitis [186] in cattle, and with the history and number of animals being affected, some of them as severely as these animals are described, the conclusion would be that the animals are affected with infectious mammitis.

Q. And if the effect of the disease was to cause the udders of some of the cows—of practically all the cows to discharge pus and some of the udders to break open and slough out and become diseased, would that be further evidence of an infectious mammitis?

A. Yes, sir; that would be further evidence. The infectious mammitis is a severe type. In ordinary garget, or mammitis, resulting from an injury, without the invasion of infectious bacteria, such result would not follow, unless the bacteria also invaded.

Q. And if the cows of Mr. Skinner merely had what is known as traumatic mammitis, or ordinary garget, would you find such organisms when you made the bacteriological examination?

A. The presence of these organisms may occur under varying conditions. The presence of this staphylococcus is rare. You take this organism, it is found under varying conditions, but is found in association, a pathological condition as existing here, you would expect that was the cause of the organisms. On the other hand, if the ordinary mammitis in such organism is found, and it is not spreading, you would not necessarily conclude that that organism was associated with that ordinary mammitis. If the plaintiff used upon his ranch for irrigating

(Testimony of Dr. George H. Hart.)

purposes, and for the purposes of furnishing drinking water to his cows, a water with which he washed the utensils used with the milking machine, or the milkers used in washing their hands, [187] and it was found from a bacteriological test of this water that there was present yellow organisms or staphylococci, the cows might become infected with this water, the opportunity for infection would be there. The infection in these cases occurs through the teat canal, through the duct that goes up through the center of the teat. Now, this infection could occur, either by the animals walking through this water, as I have stated, or by the teat cups being washed in this water and not sterilized, and then being placed back on the cow, or by the hands of the milker that was washed in this water, and after even those hands were dried, they would still contain the organism if it were present in large numbers in this water, and in that way it would be possible to get on to the end of the teat and pass up into the teat duct to the inside of the udder. As the probability of a cow becoming infected with infectious mammitis, if the water in which she waded, or the mud around the farm contained water infected with staphylococci, if the cow was in the mud, the probability would be greater than in the water. It seems that in corrals, the experience that we have found around the City of Los Angeles, has been that where cows are in muddy corrals, so that they have to lie down under wet conditions, and mud sticking around the teats, that there is considerable or some greater probability

(Testimony of Dr. George H. Hart.)

of infectious mammitis than if they walked through streams of water.

Q. And if the cows were permitted to stand in a yard uncovered, and the manure and droppings from the cow were permitted to *remain the yard* for a period of a month before [188] being cleaned out, and the cows were permitted to lie down on the ground covered with these droppings, what would you say as to the probability of their becoming infected?

A. Well, with me the presence of the droppings in the canal would not necessarily lead to the probability of infection. If there was mud and overflowing water in addition, so that when they laid down they were in mud, and they were constantly in mud, so the teats would be in the water and in the mud, the probability would be greater. As to the precautions which are usually taken in making a place for cattle to stand to prevent the spread of infection, it is important to separate the infected animals from the noninfected and to provide dry, clean quarters for the noninfected ones to lie down, on the assumption that the mud is infected, and that it is necessary to give the cattle a dry, clean place to lie down. For the standing of the cattle, they usually provide a cement or wooden floor; it is required around this section of the country to have a wooden or a cement floor—required by the city ordinance, in order to ship milk in Los Angeles, to have a cement floor—dairies not having cement or wooden floors upon which the cattle may stand, cannot supply milk for

(Testimony of Dr. George H. Hart.)

consumption in Los Angeles City. Stanchions are ordinarily used in dairies; stanchions are simply a tying place in front of this floor to hold them while the milking is being done; there is a city ordinance requiring such stanchions; and the purpose of the ordinance is to secure a cleaner milk supply, to prevent the cattle from moving around in a manure-laden corral while milking is being done. I have observed a great many dairies throughout this territory supplying milk to [189] Los Angeles City; stanchions are usually built, whether they are using a milking machine or not; and either cement or wooden floors. I should not consider a dairy farm properly equipped unless it had a cement or wooden floor upon which the cattle could stand, and I would consider that stanchions are a necessary and beneficial thing to have on a dairy.

Q. State whether or not a milking machine utensil, or the hands of a milker, can be properly cleansed by washing in ordinary water not boiled?

A. If the water has been boiled, the utensils would receive no bacteria from the water, but the water would immediately become infected with bacteria the minute the utensils were put in.

The COURT.—How is that?

A. I say, if the water had been boiled—either, if the water had been boiled and cooled down again, the water would be sterile, but as soon as the milking utensils were put in the water would immediately become infected with bacteria.

Q. Would it sterilize the utensils?

(Testimony of Dr. George H. Hart.)

A. Not if the water had been boiled and then cooled down. Boiling these teat cups having rubber in them would not dissolve the rubber: it is hard on the rubber; they usually put them in lime water. It is practical to boil them, but the life of the rubber is not as long if boiled every day than if not. The practical way to sterilize them is to dip them in boiling water and take them out immediately—they are required to be in there a certain length of time. If you sterilize a teat cup with the rubber, such as in the Sharples Mechanical Milker teat cup, it would not destroy [190] the rubber. If one washed the utensils in water in which they would place their hands that is no hotter than one could place their hands in without injury, that would not sterilize at all.

If a cow became infected with ordinary garget, or non-infectious mammitis ordinary local treatment should be administered; the excessive feeding should be stopped; the cow should be given—see that her bowels are moving freely, and local treatment such as massage or hot fomentations, or oleaginous preparations rubbed over the surface of the udder. The chances are good of affecting a cure if it is a non-infectious mammitis. Whether ordinary traumatic mammitis ordinarily results in the *soughing* off of the quarter, or abscesses forming, depends upon the extent of the injury; if the injury is a very severe injury, an unusual injury for an animal to receive, it is immediately followed by bacteria; but that would require

(Testimony of Dr. George H. Hart.)

severe injury; and that would be where the infection had been invaded.

Q. And would you say that the serious condition of the cows resulting in the sloughing of the quarters, that would result from the infection, or pus-forming germ which is formed in the udder?

A. It generally follows upon a severe traumatism, such as one animal running across the corral and jumping on the udder of another animal lying down. If a cow had received an ordinary injury such as might result from a bruise, or rough handling, and before any bacteria invaded, the cow could usually by proper and prompt treatment be cured.

I have seen a Sharples Milking Machine, and have seen them in operation. I have examined the udders of cows [191] upon which the Sharples Milking Machine was being used. The last place I examined was at West Chester, at the dairy that is run at the experimental farm by the Sharples Separator Company. I was in Philadelphia this summer and went down there. I am not in the employ of the Sharples Separator Company; I simply went there to observe it.

Q. State what you observed in the condition of the udders of those cows.

Mr. SWING.—We object to the question on the ground that evidence as to how other machines work is not admissible to show a compliance with the warranty under which the machine in question was sold to plaintiff, and we object to the question on that ground as incompetent, irrelevant and immaterial

(Testimony of Dr. George H. Hart.)

how some other machine worked, and on the additional ground that no foundation has been laid.

The COURT.—I will sustain the objection as to the cows at West Chester, Pennsylvania.

Mr. PARKE.—Note an exception.

EXCEPTION NUMBER 19.

And said defendant, said Sharples Separator Company, a corporation, now assigns said ruling as error.

Q. In your opinion, Dr. Hart, after observing the manner in which the Sharples Separator Company's milking machine operates and works upon the udders of a cow, state whether or not, in your opinion, if the machine is handled in a careful and proper manner, it would result in producing infectious or non-infectious mammitis?

A. I have seen it operated without the production of that disease; the likelihood of producing such diseased condition would not be good; and if it were handled properly it could be operated without any infectious mammitis resulting. [192]

Q. State whether or not, in your opinion, if a Sharples milking machine were used in accordance with the book of instructions which has been furnished to the plaintiff, and which you have examined, would the operation of the machine under those conditions likely result in 20 or 30 out of 90 cows becoming permanently injured for dairy purposes, by reason of the sloughing of the bag, or the forming of abscesses thereon?

A. No, sir; it would not, if it was used by a man of ordinary intelligence, particularly the owner of a

(Testimony of Dr. George H. Hart.)

herd—the owner of the ranch, if he followed the instructions. For instance, there are men of the type of milkers that are found around this country that even though they thought they were following the instructions as given in this book by the Sharples Separator Company, he wouldn't be following those instructions, and had no knowledge of mechanics, and that type of men are not considered sufficiently capable of handling a milking machine, even though they are capable of hand milking cows.

Q. State whether or not during the year 1914, milk or any other dairy products from Imperial Valley were permitted by the City of Los Angeles to be shipped here for consumption in Los Angeles City?

Mr. SWING.—Objected to as incompetent, irrelevant and immaterial.

Said objection was then and there sustained by said Court, to which said ruling said defendant, said Sharples Separator Company, a corporation, then and there duly excepted, and now assigns said ruling as error.

EXCEPTION NUMBER 20. [193]

Cross-examination.

The germs which I have named are generally quite prevalent; they are spoken of as ubiquitous, omnipresent. These organisms that I have mentioned are found in the mouth, on the hands,—generally present; they are generally found most in most any place we go to look for them; they are varied strains. Being always present, it would naturally follow that any serious injury to the teat or udder of the cow,

(Testimony of Dr. George H. Hart.)

would be immediately followed by invasion of bacteria. Serious injury would immediately be followed by bacteria under ordinary conditions. The term "sporadic infection" is now considered to be hardly exact, because when you have sporadic mammitis, there is generally, if not always, followed by invasion of bacteria; frequently even sporadic mammitis is frequently associated with bacteria. The strain of these bacteria in sporadic mammitis, even though present—the milk from a normal cow contains bacteria, and even in sporadic mammitis there are bacteria. These strains, if they happen to be the organisms mentioned, are usually not of a sufficient pathogenic strain to be communicated from one animal to another.

Q. In the milk ducts, or in the teats of these cows, healthy normal cows, you would find these bacteria which you have stated in your direct examination, would you not?

A. You might not find those particular organisms in every cow, but they would be found in the milk; I would not say it would be unusual that they would be found, and the cow would be normal. Those germs tend to affect a healthy tissue or membranes; there may be pathogenic strains of them. Assuming that a Sharples Mechanical Milker first caused an [194] injury to a cow and an irritation and inflammation of the teat and the udder, it would be the natural thing to follow, if that injury were serious, that at a time two or three months subsequent to find that there had been invasion and pus.

(Testimony of Dr. George H. Hart.)

Q. And if there had been an injury by a Sharples mechanical milker to the teat of a cow say in the last of June or the first of July, in 1914, and an examination was not made until October—about the 20th day of October, could you determine by that examination, and on finding that there was pus at that time, two or three months after the first injury, could you determine whether the original cause of the condition then found was sporadic mammitis or infectious mammitis?

A. You would require the history of the case, and an examination of the case, with the severity of the infection and the finding of the organism and the finding of the organism would be possible three or four months after the original infection, after an animal became infected with mammitis. The organisms may remain even though the organisms appear to be normal, and start in on a new outbreak when the animal comes fresh again.

There would not be any difference in what cows picked up the bacteria between those being milked by hand and those being milked by milking machine in the same herd under the same conditions; that in itself would make no difference, whether they were milked by hand or milking machine, provided the milking machine was properly handled. If there was a string of dairy cows all subject to the same identical condition, and one part being milked by a milker, and another part being milked by hand, and the part being [195] milked by milkers were the only *owes* which developed swollen quarters or udder

(Testimony of Dr. George H. Hart.)

trouble, and those being milked by hand which were subject to the same identical surroundings and conditions, except as to the way they were being milked, but in those being milked by hand, the swelling rapidly disappeared, I would say that the bacteriological surroundings would have something to do with the condition of the cow that had the swollen quarters; the fact that an injury, if there is any injury, produces a more favorable field for bacteriological development if they were present than if there was no injury.

Q. Doctor, assuming that the plaintiff in this case, in February, 1914, had a healthy herd of some 90 dairy cows, all of which had been entirely free from garget since the herd had been collected, that plaintiff then bought a Sharples mechanical milker, which was installed by an expert operator, furnished by the defendant company, who after installing the machine, instructed plaintiff, his son and hired man, in the care and operation of the milker and remained with plaintiff until he pronounced the machine properly installed and adjusted and plaintiff and his milkers proficient in the operation of the machine; that thereafter the machine was cared for and operated by the persons who had received instructions as aforesaid, and was cared for and operated in accordance with the instructions furnished by the defendant company; that after the milking machine had been so used on plaintiff's cows for about 30 days, said cows began developing swollen quarters; that the cows showing swollen quarters were promptly taken off of

(Testimony of Dr. George H. Hart.)

the milker and thereafter milked by hand, following which hand milking the [196], swelling rapidly disappeared and did not reappear in the affected quarters, or in any other quarter of that cow, so long as she was milked by hand, or in the udders of any other cow in the herd, being milked by hand; that the cows which were being milked by hand were subjected to the same conditions of feed, water, quarters, exposure, surroundings and handling as were the cows being milked by the milker, i. e., all the cows whether milked by the milker or by hand, were subjected at all times to the same identical conditions, and surroundings, with one exception, that one part were being milked by the milker and the other part were being milked by hand, that notwithstanding which the cows which were being milked by the milker continued to develop swollen quarters so long as the milker remained in operation upon them, while in those being milked by hand the existing swelling rapidly disappeared and did not reappear so long as they were milked by hand; that on the 25th day of June, 1914, the defendant, the Sharples Separator Company, sent its expert operator to plaintiff's ranch and he took charge of all the plaintiff's cows and of the milking machine and after thoroughly disinfecting the machine and the premises, began milking all of plaintiff's cows with the milker, including those cows which had theretofore had swollen quarters; that in a very short time the swellings reappeared in the cows which had theretofore had it, in an aggravated form, which became so intense in the

(Testimony of Dr. George H. Hart.)

case of about 17 cows, as to stop the passage of milk from the udders; that said expert operator stopped operating the machine about July 7, 1914, and the milker was not again operated until about October 20, 1914; that in said interval all the cows were [197] milked by hand and during that time no new cases of swollen quarters appeared; that on October 20, 1914, the milker was again begun by the same expert operator, who had operated from June 25th to July 7th, and he continued operating it on about 30 cows up until December 20, 1914; that the cows on which said milker was so operated were cows selected by said operator and which had not theretofore shown any udder trouble; that during those two months, between 8 and 12 of the cows being milked by the milker developed swollen quarters; that of the 60-odd remaining cows of the herd being milked during the same period by hand, developed no new cases of swollen quarters; that the cows which were being milked by the milker and the cows that were being milked by hand during said period, were subjected at all times to the same identical conditions and surroundings with the one exception, that the one part were being milked by the milker and the other part were being milked by hand; that said expert operator stopped operating the same machine on December 20, 1914, and the same has not since been operated on any of plaintiff's cows; that plaintiff has never had any such case or any similar case of swollen quarters in his herd before beginning the use of the milker and there has been no case of swollen quarters in his herd

(Testimony of Dr. George H. Hart.)

since the milking machine quit, would you say, under those circumstances, that the condition referred to in the question, the udder trouble of Skinner's cows, was caused by bacteria in the first place, or by some injury from the milking machine?

Mr. PARKE.—We object to the question as incompetent, irrelevant and immaterial, and assuming conditions not pertinent and not in evidence. [198].

The COURT.—Objection overruled.

Mr. PARKE.—Note an exception.

EXCEPTION NUMBER 21.

And said defendant, said Sharples Separator Company, a corporation, now assigns said ruling as error.

A. Just what is the question,—whether the trouble was caused by the milking machine, or whether it was caused by bacteria?

Mr. SWING.—Yes, sir; in the condition stated by my question.

A. The ultimate trouble was due to bacteria. The primary cause in this case, there being only part of the animals that were milked by the milking machine that were affected—is not that what your question said?

The COURT.—That is what he states in his question.

The WITNESS.—(Continuing.) That in this case the milking machine could have provided a condition in the udder in this percentage of animals which may have been easy milkers or hard milkers, and as the rules of the company show, should be handled under slightly different conditions, but they

(Testimony of Dr. George H. Hart.)

may not have been so handled, or they may have been handled, but nevertheless the milking machine may have, under those conditions, produced a favorable field for these bacteria to multiply. They may have caused some kind of an injury, or some kind of a reduction of those tissues through the resistences which they ordinarily have. I am familiar with the instructions furnished by the Sharples Separator Company for the operation of their machine. I do not remember that I ever found in there any place where it said to boil the teat cups: it mentions putting them in an antiseptic [199] solution. It says to put them in lime.

Redirect Examination.

This same favorable field which I spoke about might be created by hand-milking if the cows were abused—that could be created by hand-milking: any milking injury could be produced in the same way; and in the use of the milking machine upon an easy milking cow, if you use the same amount of pressure and the same amount of vacuum which you used upon a hard milking cow, the same result might have been as if you bruised the teats by hand; and if one cow became thus injured and developed mammitis, or the diseased condition developed into infectious mammitis, that condition might spread throughout the whole herd within a reasonably short time. If the cow's bag should become injured by another cow stepping on it, or kicking it, or producing a traumatic condition, and the bacteria invade, and the cow thus became infected with infectious mammitis, that

(Testimony of Dr. George H. Hart.)

might spread throughout the whole herd: after these organisms find a favorable field to grow, those particular organisms are of a more virulent strain than before it had grown on such a favorable field. There are many conditions which might create this favorable field; any kind of an injury might create a favorable field.

Testimony of Lynwood J. Kelly, for Defendant.

Thereupon LYNWOOD J. KELLY was called as a witness on behalf of the defendant Sharples Separator Company, a corporation, and said Lynwood J. Kelly having been first duly sworn, testified as follows:

Direct Examination.

My name is Lynwood J. Kelly. My business is that [200] of superintendent of the Shore Acres Dairy & Land Company, San Leandro, California. I have attended a veterinary college at the University of California; but they do not give a full veterinary degree there. I am not a graduate veterinary. They give a fairly good course in the general veterinary course, including bacteriology, to be of assistance; beyond that, there is no pretense of giving a degree. I have taken all of the work given by the University of California. I was born and raised on a ranch; for 13 years I was actively engaged in handling of stock. Since I came out of college, I have been in the dairy business, and I have spend several years with the University—two years with them as foreman of the Halsium on the dairies of which I have had charge. I have been in charge of the Shore Acres

(Testimony of Lynwood J. Kelly.)

Dairy at San Leandro since it was started three years ago last January. I was also in charge of the Sleepy Hollow Certified Dairy at San Anselmo, California; I was there for several months at a time, when the superintendent was east, at two different times. I have had some experience with the various diseases of cattle, particularly diseases of the udder; of course anybody in the dairy business has those complications to contend with. I have made a study in college, and since I came out, of diseases, and the causes and cures. Mammitis is a general term for an inflammation of the mammary gland—the glands that produce the milk—the bag in general. Infectious mammitis is an inflammation that sets up in the udder, due to the invasion of some specific organism. All of the pus-producing organisms, principally the micrococcus variety, are generally associated with *infection* mammitis. Traumatic mammitis is caused by [201] some superficial injury; there is no pus-producing germ present in traumatic mammitis. If a number of cows in a herd have swollen quarters and the quarters are, in addition to being swollen, sore to the touch and are discolored, and in many instances abscesses form, and either the quarters slough away through abscesses, or pus runs out of the teat, and samples of milk from these cows are taken, a bacteriological test or examination made, and yellow micrococcus found, and an examination of the milk taken from the cows shows that it has at first, strains of a watery substance, and later a cheese-like substance comes out, and it has a sickish, sweetish smell, under those

(Testimony of Lynwood J. Kelly.)

circumstances, I would look for an infectious form of mammitis. If there were no infection present no infectious germs, there would not be any abscesses or sloughing away, or pus from the udders, unless the bruises were of such a nature as to bring on a necrotic condition, and that necrotic condition would be brought on by the invasion, after the injury, of some pus producing organism. I think that it would be necessary for the infectious bacteria to get into the injured part before there would be any pus forms.

Infectious mammitis almost invariably comes from external sources. The organisms that are contained in the udder are as a rule nonpathogenic, that is to say, those that are not disease producing in habit; that is, they are germs, but they are not such germs as produce disease. A pathogenic germ is a germ which *much* be or is actively producing and diseased. In case of infectious mammitis, the organism invades the udder through the teat ducts and is taken on to the teat or through some abrasion of the udder from some external source. If the plaintiff [202] in this case irrigated his farm and watered his cows and washed the milking machine and the teat cups, and the milkers washed their hands from water in which yellow micrococcus similar to the yellow micrococcus was found, and an examination was made of the milk taken from the udders of the plaintiff's cows, in which pus had formed, and the quarters sloughed away in some instances, and it were found from a bacteriological test of the milk taken from the ud-

(Testimony of Lynwood J. Kelly.)

ders of the cows, and from the water taken from the common source from which the plaintiff obtained his water supply, that there was present in both the milk and water the same yellow micrococcus or infectious organism,—from such a history, the infectious form of mammitis is the first thing I would look for—I think it would be very possible that under such conditions the cows would probably become infected from this infectious germ in the water. I do not think there is very much doubt that in case a cow had traumatic or non-infectious injury, and there was present no pus generating germs, that upon proper treatment of the cow, the quarters so affected could be saved. My experience has been that traumatic mammitis is very easily overcome by proper treatment. Under those circumstances, I should use an ointment on the udder, with general massage, and look to the physical condition of the animal, make sure that the functions were working properly, and that, with the massage and the ointment, would generally bring out a cure. In case there was present on the cows a pus condition, with an abscess, and the quarters were sloughing away, when it has gotten to that point the probability is not quite so good for a cure; in case of udder troubles, the sooner the treatment the [203] better. If no pus generating, or infection gets in, my experience is that the traumatic condition can be cleared up; I never know of a cow dying from traumatic mammitis. It is possible that a cow might die from traumatic mammitis, because the origin of the

(Testimony of Lynwood J. Kelly.)

case might be traumatic, and an infection follow. But where no infection is present, I never knew of a cow dying from traumatic mammitis.

In case one cow in a herd receives an injury of some kind, and traumatic mammitis is present in the quarter or udder of one cow, and that cow becomes infected with a pathogenic infectious germ, and that cow comingles with the other cows, it is possible for the other cows to become infected from that one cow. The possible or probable manner in which infectious mammitis could be communicated from one cow to another, would include the case where the infection would be drawn from that infected quarter and transmitted by the milker from that cow to another cow; that would be the direct way. And an indirect way would be, that cow when she is milked, the last bit of milk that comes from that quarter stays on the bottom of the teat, and that cow lies down, and that rubbed off on the ground, or wherever she happened to lie down, and another cow coming in contact with that same spot is liable to pick up that organism in the same way that the cow dropped it. And if, when you milk a cow, you put the first couple of squirts of milk on the ground that is likely; because you are putting your infection on the floor where the other cows can pick it up. A cement floor, or cement or board floor, or some dry substance is necessary in an ordinary good dairy for the cows to stand on when they are milked, because it is impossible to [204] obtain any other kind of a floor; a ground floor simply sucks up the fluid, and

(Testimony of Lynwood J. Kelly.)

a board floor is a little better, not much, on account of the cracks; and a cement floor can be thoroughly cleaned. In a dairy milking in the neighborhood of ninety to one hundred cows, it will be the very best thing for the dairy to have a cement floor where the cows stand when they are being fed over the night, and while they are being milked. Stanchions are the usual methods of tying the cows in a barn you use a short rope, possibly, but it gives the cow a little too much rope to walk around when you want to handle her. The stanchion method is the ordinary way of handling cows in a barn where they use a milking machine, or not; and I would consider a dairy barn equipped with stanchions a better barn for dairy purposes than when not so equipped.

I understand the manner in which a Sharples Milking Machine operates; in my opinion, the use of a milking machine with reasonable care and prudence, cannot cause infectious mammitis among a herd of dairy cows upon which it was being used. I base this view largely on the fact that I operated a Sharples machine on a large herd for a period of nearly two years; as to how large the herd was, at present, we are milking a little over 200 cows, about 206 cows; and it will be two years the first of December that I have been using the Sharples machine. From my experience and observation, and use by myself of the Sharples Mechanical Milker over a period of two years upon a herd of cows as I have stated, I think the machine can be used successfully with cattle, without danger of injury to the cows,

(Testimony of Lynwood J. Kelly.)

provided the dairy man is careful in operating the [205] same. I have operated that machine. I recognize this book which you hand me; the cover is a little different from the book received by me; the context seems to be the same.

Mr. PARKE.—We ask to have this marked.

The CLERK.—“A.”

The COURT.—Now, if you operated this machine as directed in this book, is it a successful machine?

A. Yes.

Q. Would it hurt the cows' bag? A. No.

Mr. PARKE.—Now, just explain on what you base your answer to the questions asked by the Court.

A. When the machines were installed, on our herd, we had that book of instructions and we followed it.

The COURT.—I don't care anything about your herd.

A. Well, those are the instructions.

Mr. PARKE.—Well, if the Court please, I insist that the witness has a right to give the reasons upon which he bases his answer, whether or not the machine is a success. He says it is a success, and he has a right to give the reasons upon which he bases that opinion.

Mr. PARKE.—We now offer to show by this witness that he has used a machine identical with the one in question in mechanism upon a herd of some two hundred dairy cows for a period of over two years and has never had any injury.

Mr. SWING.—Our objections to the offer as it now stands are that it does not include any offer to show

(Testimony of Lynwood J. Kelly.)

that the conditions under which this machine was operated were similar or identical with this under which the machine of the plaintiff's was operated.

The COURT.—Objection sustained.

Mr. PARKE.—Note an exception.

EXCEPTION NO. 22. [206]

And said defendant, said Sharples Separator Company, a corporation, now assigns said ruling as error.

Q. State whether or not you get as much milk from a dairy herd of 200 cows at the Shore Acres Dairy as you did from hand milking.

Mr. SWING.—We object to that on the same ground stated in our last objection; it is incompetent, irrelevant and immaterial.

The COURT.—Objection sustained.

Mr. PARKE.—Note an exception.

EXCEPTION NUMBER 23.

And said defendant, said Sharples Separator Company, a corporation, now assigns said ruling as error.

The WITNESS.—(Continuing.) The Sharples Milking Machine will cause the cow to give as much milk when used on a cow as if she were milked by hand. I base this on observation in our own herd, and other herds with which I have come into contact. When our dairy was started we took count of each particular cow, what they were producing regularly; and when the machines were put in we kept up that system we were following before, and according to our figures there was no change in the flow of milk after we put the machines in.

I visited Imperial Valley in the spring of 1912, on

(Testimony of Lynwood J. Kelly.)

veterinarian business from the University of California—working on some investigations. I visited several ranches; all of them had dairies on them. In visiting there, I had no particular reason to pay particular attention to the water, but I made some observations. From my observations in Imperial Valley, and my observations in the use of the Sharples machine at the Shore Acres Dairy, and other places, I can [207] see no reason why the Sharples Milking Machine should not be used with success in the Imperial Valley. When I was down there, there was a very severe sand storm; such a condition is not conducive to the maintaining of sterile milking utensils; and such dust as was in the atmosphere was very possibly laden with pathogenic organisms, which would be liable to gain entrance into milking utensils of one kind or another; and if there were infectious or pathogenic germs in one dairy, they would be likely to be carried to another dairy.

Cross-examination.

On an average, the dairies are apart from a quarter of a mile to one-half or three-quarters of a mile, and sometimes three or four miles. Possibly, one ranch may have developed in its cattle a virulent type of germ which can be carried from one ranch to another. The micrococcus is generally present. When I spoke of blowing, I spoke particularly of blowing around the milk house. I do not know from bacteriology whether sunshine will kill the micrococcus or not; I will not say that

(Testimony of Lynwood J. Kelly.)

it will not; I do not know whether a germ could live to blow from one ranch to another if the sun were shining. My answer about how a mechanical milker would work is not based on any operation or experience in the Imperial Valley, but in similar climates. If the first milk was squirted on the ground, the other cows would take it up on their teats, when standing on the floor. They lie down in the stanchions while you are milking other cows. It is out in the corral in the manure and in the dust.

[208]

Q. Now, I will ask you if a string of cows are being milked part by the milker and part by hand, and they are comingling, and they all lie down in the same corral, and they all get up together, would, in your opinion, there be any difference in what cow would absorb the pathogenic germ, with a cow being operated by the mechanical milker, or the one by hand; in other words, would the germs show any preference in your opinion?

A. Yes, I believe they would; if the germs were there at the teat, and the teat cup is placed on to that teat, it is there in closer contact than it would be if a man is milking by hand. The instructions call for always squirting a few drops out of the teat; that would tend to clean out the teat. The germs might be in the teat cup from previous milking, or from another cow that was affected. The instructions are that after the previous milking the teat cup is put in lime water; presumably, the germ would not then be in the teat cup; if so, it would be in latent form;

(Testimony of Lynwood J. Kelly.)

but the disease would be in one cow. You can transmit the disease by the hand of the milker just as well as by the teat cup.

Q. Now, assuming this herd is being milked part by hand and part by the milker, and that the herd—both parts are under the same identical conditions, surroundings, and so forth, with the one exception that part are being milked by the milker and part are being milked by hand, and the only cases developing swollen quarters are those being milked by the milker, and none originated in those being milked by hand, how would you explain that situation?

A. The only way I can see that is the organisms were carried by the teat cups from one cow to another, more readily— [209] that is, what I mean, because the teat cups were in closer contact than the persons's hand—the milker's hand. There is a little preference in my opinion for the transmitting of this germ between the teat cup and the moist hands of the milker; the teat cup fits closer to the teat than the operator's hand, and therefore the germ is there where it can come in closer contact with the teat duct; and whether that would explain the fact that all of these cases originated with the cows being milked with the milker and none being in those if milked by hand is hard to answer. In my opinion, the disease will be transmitted if it is of an infectious order from one cow to the other, either by hand or by machine, but by machine the disease will carry from one cow to another a little more readily.

Q. Do you say that the swollen quarter described

(Testimony of Lynwood J. Kelly.)

in my question, to which I am directing my question, was infectious, when those were the symptoms, that it appeared only in the cows being milked by the milker and that it did not appear among the cows being milked by hand?

A. I cannot tell from your description.

Q. Go a step farther. You have referred to the water containing these pathogenic germs, which you implied produced the trouble, and they washed—the milkers washed their hands in it. If the milkers washed their hands in this water, and they also washed the teat cups, assuming that they did not sterilize them as called for by the instructions, suppose they just simply washed them in this sterilized water, would there be any difference in the transmitting of the germs to the teats of these cows, between transmitting by hand from the water to the cows being milked by hand, [210] and transmitted from the water to the cows being milked by the milker?

A. I think, in the same case, your milking machine cups would be a better carrier.

Q. Granting that the cups would be a better carrier, would that explain the fact that all the cases amount in the aggregate to fifty per cent of the herd, all developed on the cows milked by the milker, and not a one developed on the cows milked by hand?

A. It is hard for me to realize such a condition, but I think it is possible, assuming in that case the milkers milking by hand didn't use any soap in washing their hands.

(Testimony of Lynwood J. Kelly.)

Q. Just simply didn't disinfect them? They simply washed in this water which we are assuming contain micrococcus citreus, or the organism testified to by Dr. Taylor, which you intimated was the cause of the contamination of the cows producing swollen quarters, and I asked you if that was the source or the origin of the trouble which produced the swollen quarters under the milker; why would it not also produce the same condition with the cows milked by milkers where they washed their hands in the same water?

A. I think it perfectly possible for the hand milking to spread the disease the same as the other, but to a little less extent.

Q. And if the hands were contaminated in the same way that the teat cups were contaminated through the water, there would be evidence of it just the same as the cows milked by hand, as the cows milked by the milkers?

A. To a less extent. It would show but to a less extent. If it did not show at all, it would be my opinion that the water was not the source of the trouble. I could not say it was [211] the cause. These pathogenic germs referred to may invade healthy, uninjured tissue or membranes; it is possible; they can stir up a diseased condition. There have been cases where the diseases have been found, but they have not been very numerous in number. I took my course at the University of California; I know Archibald Robinson Ward, B. S. A., D. V. M.; I took some courses under him; his opinion on this

(Testimony of Lynwood J. Kelly.)

subject ought to be an authority. In my opinion, the yellow micrococcus is infectious; its simple presence in the udder would not denote infectious mammitis without the inflamed condition that goes with it. It may be in a latent form, or it may be of a less virulent strain than would ordinarily produce the inflamed condition.

Q. If Dr. Ward says that he doesn't consider the orange yellow colonies of micrococcus to indicate an abnormal condition of the udder, would you think that that was an authority?

A. I would like to ask in what year that statement was made.

Q. I have it reprinted from American Magazine, February 14, 1903, which was furnished to me this year by Dr. Harding as his latest authority.

A. Well, I think that anybody who has made a study of bacteriology would not take as authority anything that is 10 or 13 years old. I do not know of any later opinion by Dr. Ward on this matter. If Dr. Ward stated that he had examined 16 healthy udders and had found this yellow micrococcus present in every case, and the others were healthy, that would not affect my opinion; because as I said before, the yellow micrococcus might be there, and at the same time they may [212] not be virulent enough to produce a diseased condition; an injured tissue furnished a better food for the propagation and reproduction of organisms.

Q. And I will ask you this question; assuming that a herd of dairy cows were being milked, one

(Testimony of Lynwood J. Kelly.)

string by a milker, and another string by hand, and the only case of mammitis to appear in the herd appeared in the cows being milked by the machine, and that when the condition so appeared, the affected cows were taken off the milker and milked together with the other cows being milked by hand, not being isolated, and that the milkers didn't wash their hands or disinfect their hands between cows, and the cows so affected got well, and the mammitis didn't spread to a single other cow being milked by hand, would you say that the cows had infectious mammitis?

A. It does not seem like it to me, no.

Redirect Examination.

Q. But if you put a milking machine upon a herd of 90 cows, Mr. Kelley, and in a period of 30 days, and thereafter continuously, the cows—at least, 25 to 30 of them—got swollen udders, inflamed, discolored, some of them broke out in abscesses, and the whole quarter sloughed away, and a great many of them have pus running from the teats, would you say from that indication that there was infectious or merely a traumatic condition?

A. From the number of cattle you speak of, it appears to be infectious.

Recross-examination.

I base this upon the number of cattle because traumatic [213] mammitis does not carry with it an infectious nature, and therefore would not spread from one cow to another. Numbers are controlling

(Testimony of Lynwood J. Kelly.)

in a way. If you went down the line of stanchions and kicked each cow in the udder, and you had 15 cases of mammitis, and you knew you had 15 cows that you had kicked, that is a case where you would have known the history of the trouble.

Q. And in this case you know that the cows have been milked by a milker?

A. There would again be the question as to the operation of the milker.

Q. More numbers than is not controlling, is it?

A. Not with the history of it, but you have got to know the history of it.

Q. You spoke of injured tissues being a better food for infectious or pathogenic germs. I will ask you, from your observation of the use of the Sharples milking machine at various places, whether or not it if properly operated, injures the tissue of the udder.

A. It does not.

Recross-examination.

I do not say that it is impossible for the milker to irritate the teats of a cow. If it did irritate the teats of the cows that would produce a field favorable to a germ.

Q. And would you say that where such is produced, a field favorable to the invasion of the germs, by a milker that *is* milked the cows without injury?

A. Is that hypothetical? [214]

Q. Yes, sir; it is hypothetical.

A. Considering it as a hypothetical question, I would say yes.

Q. You would say what?

(Testimony of Lynwood J. Kelly.)

A. Considering that as a hypothetical question, I would say that if the milking did injure the cattle, it would give a field—

Mr. SWING.—Just a minute What is that answer?

(Last answer read by the reporter.)

A. (Continuing.) —give a proper field for the propagation.

Redirect Examination.

Q. Just a moment. The same field, by injury of tissue, might result from use of the hand milking, might it not, Mr. Kelly? A. Yes, sir.

Testimony of Leo Van Denenden, for Defendant.

Thereupon LEO VAN DENENDEN, was called as a witness on behalf of said defendant, Sharples Separator Company, a corporation; and said Leo Van Denenden having been first duly sworn, testified as follows:

Direct Examination.

I live at Corcoran, California, and have lived there ten years. My business is that of a dairyman. I have been in the dairy business ever since I have been a little boy. I have been in the dairy business in California since I came here. I worked for C. G. Lamberson, the last three years; his herd of cows is 120 head. I have observed the operation of a Sharples mechanical milker. I am acquainted with the ordinary diseases of udder troubles [215] of cattle; I am not a veterinary, but whenever there is any trouble, I can cure it,—I cannot explain the diseases, the names. I do not understand the tech-

(Testimony of Leo Van Denenden.)

nical names. I am familiar with swollen bags of cows, and have had occasion to treat them. I understand the theory and method and operation of the Sharples mechanical milker. My use of the Sharples mechanical milker has extended over 16 months. I have seen it operated at more than one place. From my observation, in my opinion, the use of the Sharples mechanical milker, when properly operated, cannot injure the cows upon which it is used. If properly used, it is impossible to injure a cow, because it is too soft to squeeze the teat to injure with proper care; but if you get a man to operate, say, it is just as good that way as any other, why, it will injure the cow. From my observation, it is necessary to adjust the amount of pressure and the amount of vacuum when you are changing from one cow to the other. On the pulsator there is something by which you can adjust the amount of pressure and the amount of vacuum. I have been in a position to observe, and have observed the effect of the use of a machine upon the udders of cows. I have been in a position to observe whether or not it affects or destroys the tissues, and injures the tissues. According to my observation, it does not injure the teats or udders of the cows. It cannot do it if you handle it proper. My experience with the use of the machine has been for 16 months. I got just as much milk from the cows by milking with the machine as I did by hand; just as much or more. I kept track of the milk, but I did not run the dairy

(Testimony of Leo Van Denenden.)

when it was run by hand. I ran the dairy when we put the machine in. [216]

I did not keep the pressure the same: I changed it. I did not change the vacuum; just changed the pressure. I changed the speed. I had one of those black things up in my barn for instructions; it stated "Keep your vacuum at 17"; I left the vacuum at 17. It states "pressure at 7"; there is a little hand on that pulsator; you change it.

Q. Then you did not keep it at 17?

A. That is on the gauge, on the pipe-line—on the pressure line.

Q. That is on the pressure line, not on the milker; this says, "Keep the pulsator at 55 per minute"; you kept that at 55 per minute. A. All the time.

Q. Then this pressure you are talking about is something else besides what is on this blackboard.

A. The pressure that is on the board here is the gauge that is on the pipe-line. It is not that thing that I move. That thing that I move on this machine is this little handle here (indicating); I don't know what the name of that is; it changes the pressure on the teat cups. This pressure that is talked about is the gauge on the pipe-line; that is not in here; that is in the line in the bottom where you get your vacuum pressure from. There is overhead, along above the cows, a couple of pipes carrying the air from the air-pump and the air-tanks; there are two holes in the top of the pulsator, and when that is fastened on these hooks by the pipe-line, these two openings fit over the opening in the pipe-line. The

(Testimony of Leo Van Denenden.)

pressure referred to in this metal board, Exhibit 6, refers to the pressure on that main [217] air carrier or air pipe-line above; but the amount of pressure of air in the pipe-line does not necessarily mean the amount of pressure in the teat cups. There are two pounds of pressure when this little handle is put down—when it is moved around to the point where it says “on,” that lets every bit of pressure into the teat cups; and if you keep the pressure on the valve the same, and this valve is open, you get all the pressure in the teat cups—7 pounds. And if you turn this lever to the point where it says “off,” you would still be getting only 2 pounds of pressure in the teat cups. If you set it at an intermediate point, you would get somewhere between two and seven pounds in the teat cups.

Cross-examination.

I don't know how the milker that the Sharples Separator sold the plaintiff in this case worked on his ranch. I never saw his milker. My answers regarding the fact that these milkers can be operated without injury to the cows is not based on any observation or experience obtained in Imperial Valley. I don't know anything about the Sharples milker down there.

Testimony of F. E. Felch, for Defendant.

Thereupon F. E. FELCH was called as a witness on behalf of the defendant, Sharples Separator Company, a corporation, and said F. E. Felch having first been duly sworn, testified as follows:

(Testimony of F. E. Felch.)

Direct Examination.

My name is F. E. Felch. I live at Phoenix, Arizona. I am in the dairy business. I do not know how long I have been in the dairy business; I have been in it [218] for 30 years on my own accord. I have been in the dairy business in Phoenix for 15 years—that is in the Salt River Valley. As to the climatic conditions in the Salt River Valley, it is very warm. I have never been in the Imperial Valley. I have not particularly observed the Government weather reports from Imperial Valley as to heat conditions there. In the Salt River Valley, in the summer, it gets pretty hot—up to 120 sometimes and over. The Salt River Valley is a very extensively irrigated country, and my dairy is in the irrigated district. During the past four or five years I have milked from 30 to 90 cows. I understand the manner in which the Sharples mechanical milker operates; I have used one; and I have observed the use of one other than the one which I use myself. From my observation and experience, the Sharples mechanical milker can be used upon a herd of dairy cows by proper use and management, so as not to result in injury to the cows; I know this from experience; I have used it three years and had no injury to the cows. I have observed the use of it in some other dairies in the Salt River Valley—Mr. Harris' dairy; but I did not have much time to observe the other fellows'. My milker was used by myself, or my sons at times. During the time that I have been using the milker on my cows, I have not had any udder

(Testimony of F. E. Felch.)

trouble. I get as much milk from my cows when I am using the Sharples mechanical milker as when I milk by hand—I get more, considerably more; I got 10 per cent more on the start above ordinary hand milking. I have an instruction-book from the Sharples Separator Company. This book which you show me, marked Defendant's Exhibit 1, in evidence in this case, is the same thing as the book of instructions I [219] received. I did not receive one of those tin plates of instructions, such as plaintiff's Exhibit No. 6; I used the book altogether. My machine was installed by Mr. Albert J. Reed; he instructed me in the use of the machine. I did not know anything about the use of the machine other than the instruction received from Mr. Reed, and through the literature and the instruction-book of the Sharples Separator Company; I followed out the instructions as given in the instruction-book as nearly as possible.

Cross-examination.

I have never been in Imperial Valley, and do not know the conditions that exist there, and do not know the case of the trial by Mr. Skinner of the Sharples milker. In my opinion, it is not possible to injure cows with the Sharples mechanical milker, producing a condition similar to mammitis, if you use it according to instructions—I do not think it is.

Q. If the machine is left on for some length of time, would that produce it?

A. Well, that is the operator's fault.

Q. Well, answer my question? Will that produce

(Testimony of F. E. Felch.)

a condition similar to that?

A. I don't know; I take mine off. I think I was examined in a deposition taken at Phoenix.

Q. You were examined in Phoenix at the time the deposition was taken. You didn't make this statement? (Reading:) "You can cause garget by bruises of any kind in the udder, or you can cause garget by hand, by taking and pulling the teat after the milk is out of it, by staying with it, and I presume [220] to say that the Sharples machine, or any other machine, if it was not taken off after the milking is done, might cause garget."

A. That is exactly what I would say right now, if you were to put it to me the same way.

You adjusted this little spigot here which gives you more or less pressure. I have milked cows by hand; some teats of a cow milk easier by hand than other teats; there is a variation in teats. The idea of this little spigot is to adjust the amount of pressure to each cow's bag, according to the resistance of that cow or the susceptibility of that cow.

Q. Is it possible with this machine to adjust that, so you can vary the amount of pressure upon the different teats, according to the conditions of that teat?

A. Why, no.

Mr. SWING.—That is all.

Mr. PARKE.—That is all.

The WITNESS.—What do you mean, each teat separately; is that the question?

Mr. SWING.— Yes.

A. No; when you change the pressure you change it on them all.

Testimony of F. L. Briggs, for Defendant.

Thereupon, F. L. BRIGGS was called as a witness on behalf of said defendant, Sharples Separator Company, a corporation, and said F. L. Briggs having first been duly sworn, testified as follows:

Direct Examination.

My name is F. L. Briggs. I know Dr. Walter J. Taylor. [221] I was with him in the Imperial Valley on or about October 10, 1914. I went with him to the ranch of W. W. Skinner, the plaintiff in this action, along about the middle of October, 1914. That was the time that Dr. Taylor took samples from four of the cows of Mr. Skinner. I don't remember whether we talked to Mr. Skinner. I am in the employ of the Sharples Separator Company, and familiar with their milking machine. They do not make more than one kind of milking machines; all machines are like the one here before me, identical; and that was true in 1914. I have visited a great many dairies throughout the country. The average dairy is equipped with a cement floor and with stanchions; and that is true whether they are using a machine or not. I saw the gasoline engine which Mr. Skinner was using on his place; I believe it was an International. I am familiar with the value of machinery such as gasoline engines, after they have been used for a short period of time; I have sold them. In my opinion, presuming that Mr. Skinner paid \$175 for the gasoline engine in question about February 1, 1914, the value of that engine in use in December of that year would be fifty per cent, fifty

(Testimony of F. L. Briggs.)

cents on the dollar; I think I could sell it for that price. If a man were using it for separating milk from ninety cows, the value of it to the man so using it would be the price of it when new.

Testimony of A. Edgar, for Defendant.

Thereupon A. EDGAR was called as a witness on behalf of said defendant Sharples Separator Company, a corporation, and said A. Edgar having been first duly sworn, testified as follows:

Direct Examination.

My name is Arthur Edgar, and I am president of [222] Edgar Bros. Company. I could not state whether I entered into a contract with the Sharples Separator Company during the year 1914. I know absolutely nothing about this purported contract which you show me. I observe the signature here, Edgar Bros., by J. H. Edgar; that is Mr. J. H. Edgar's signature. He is general manager of our company. I do not believe that I ever saw this contract, or a copy.

Q. This contract was signed Edgar Bros. Company by J. H. Edgar, on the 12th of May, 1914.

A. I have actually no knowledge of those contracts; I never saw one of them; I have no knowledge of them whatever, in any way. I don't know on what date my company became the agents of the Sharples Separator Company. I know absolutely nothing about the sale of the 4th unit to Mr. Skinner. He didn't buy it from me personally. The only knowledge that I could give as to whether or not I had any

(Testimony of A. Edgar.)

contract with the Sharples Separator Company to act as their agents before the 12th of May, 1914, is just hearsay. I have no knowledge personally.

Mr. PARKE.—We offer in evidence the contract so signed by Edgar Bros. Company by J. H. Edgar and ask to have it marked Defendant's Exhibit 2. "To be annexed hereto."

Mr. SWING.—Objected to as incompetent, irrelevant and immaterial, and not appearing it is a contract that has ever been accepted by the Sharples Separator Company.

The COURT.—Objection sustained.

Mr. PARKE.—We note an exception.

EXCEPTION NUMBER 24.

And said defendant, Sharples Separator Company, a corporation, now assigns said ruling as error. [223]

Mr. PARKE.—We desire at this time to read in evidence the deposition of Albert J. Reed, taken for and on behalf of plaintiff pursuant to notice.

Said deposition was thereupon received and read in evidence in the cause, and was and is in words and figures as follows, to wit:

Deposition of Albert John Reed, for Plaintiff.

Direct Examination.

My full name is Albert John Reed, and my address is Davis, California. I installed the Sharples mechanical milking machine on the ranch of W. W. Skinner, the plaintiff in this action; I installed it on February 1, 1914. It was a Sharples mechanical

(Deposition of Albert John Reed.)

milker of three units. I installed the same kind of milking machines for parties around Phoenix, Arizona. I know F. E. Felch, and I installed on Felch's ranch a Sharples mechanical milker similar to the one at Skinner's ranch. I know Mr. Hansen down there near Phoenix that has a Sharples mechanical milker. I don't know M. S. Autry, who has a ranch down near Phoenix, nor James Willis, nor Edward L. Stalm. I have seen the machines that Hansen and Felch were operating at that time on their ranch near Phoenix. I installed them.

Q. Were they the same kind of machines that the plaintiff W. W. Skinner was using near El Centro?

Mr. SWING.—Objected to as incompetent, irrelevant and immaterial, and calling for a conclusion of the witness.

The COURT.—I will sustain the objection.

Mr. PARKE.—Note an exception.

EXCEPTION NUMBER 25.

And said defendant, Sharples Separator Company, a [224] corporation, now assigns said ruling as error.

I installed the machine on Mr. Hansen's place and Gus Harris' place and Mr. Skinner's place. I was at Skinner's ranch several times.

Q. When you were there, on that ranch, there was a dairy barn?

A. A dairy shed. It has a thatched roof, two rows of stanchions, two rows of mangers, two concrete platforms for the cows to stand on and one concrete gutter on the south side; the gutter on the

(Deposition of Albert John Reed.)

north side was without a concrete bottom; there was a wooden floor through the center. He had a milking house and power house combined, about 50 feet south of this dairy shed. The milking machines and the dairy shed connected up to the power-house and operated from the power-house. There was a water hole located between the power-house and near the power-house and dairy shed; it is similar to all water holes in Imperial Valley for washing up dairy utensils; it was a hole in the ground with water running through; it was not fenced off from the rest; it was open so that the cows could get in there and the other cattle. The cows down there were watered in holes much the same as others, the one from which the water was taken out to wash the dairy utensils and these water holes were fenced off with barb wire, fencing off a place about 16 to 20 feet; it was boarded up so that the animals could get up to this board and drink over it much the same as a trough. The water came from the main irrigation ditches; it was not well water of any kind, it was not pump water. The dairy shed was kept in as good cleanliness as it was possible to keep; it was clean all but the gutter on [225] the north side, and that, having no bottom, was more or less dirty. The gutter on the north side was without a bottom and when you took the manure out you took some dirt with it; it was not easy; and afterwards filled it in with dry sand; and the same process would go on each time. It could be cleaned out, but not as clean as it should be. Later on I made suggestions to Mr. Skinner by

(Deposition of Albert John Reed.)

which he could remedy the trouble; I put in two board planks, 2 by 12, and filled in the bottom; I did this in the latter part of October or the 1st of November, 1914. All of this testimony refers to 1914. I was there during the summer of 1914. I could not say what the temperature was; it was pretty warm; I should imagine it to be over 100. There was a water hole in there when I first went down, and I saw animals in there occasionally; I saw a pig in there drinking once; also a calf; and maybe cows, but very seldom. There was not any pen or enclosure in which Skinner kept sick calves anywhere near the water hole. I did not see any sick pigs in this water at any time, but I saw sick calves in there occasionally. As to what was done with this water in the water hole, with reference to the milking machine when I first went down there, the water was taken out of the hole and placed in a jacket which Mr. Skinner had fixed around his exhaust pipe of his gasoline engine, and that water was warmed and used to scald the teat cups and wash the dairy utensils; the water next to the exhaust pipe was boiled.

When I went down there the first time there were none of the cows down there at any time affected with swollen udders. At visits after that, there were; those [226] cows that were affected in this way were not separated from the rest of Skinner's cows. I would like to qualify that answer by saying that when I was down there in June or July there were six or seven cows separated from the rest.

(Deposition of Albert John Reed.)

A veterinary came down in the latter part of June to find out what was the trouble with the cows. I remember a statement that was made by this veterinary in my presence and also in the presence of Mr. Skinner as to what was the matter with these cows; the veterinary was called out and questioned as to the condition of these six or seven cows—perhaps there were more than that,—as to what was the trouble with them, and he proclaimed it contagious mammitis; those present there at that time when that statement was made were the veterinary, myself and Mr. Skinner. I do not remember the veterinary's name; he came from El Centro; he said, in substance, that the cows had contagious mammitis; and Mr. Skinner said that he did not believe it. Prior to June 25, 1914, there must have been 20 cows at one time or another that had swollen quarters.

I did not keep any account at any time while I was there of the amount of butter fat that came from the different cows, nor of anybody while I was there; I did not see any account. I could not say whether or not there was any difference in the amount of butter fat that the cows gave before or after using the machine; I would like to qualify that answer—very naturally, when you have 20 cows with swollen quarters they will not give as much butter fat as before that.

When I started down there on this machine, Mr. Skinner took interest in it. He had hired help. One of his sons [227] was there at the time. One son at that time was 19.

(Deposition of Albert John Reed.)

There was a calf pen alongside of this water hole; sick calves were not kept in that pen,—they were kept in that pen until they were recovered. I remember making a statement in which I said they took the water in which they used the teat cups out of a cistern and that this water was inhabited by sick calves and hogs. That statement is true. That cistern that I referred to is the water hole that I have testified about before. At the time when I was there in October I used two units; I should say that one of those units was from Edgar Bros. and one came from Sharples. I remember making a statement that the gutters were not fixed right, did not run off right, and that it was an awful dirty place; and it was a dirty place. The water in this hole came from the irrigation ditch, and was allowed to run into this hole and stand there; as to whether the water in this water hole was dirty or clean, it was renewed from time to time when it got low. It could not run off any place; it was not clean water. Before I went down there, cows were milked by hand; when I first came down, they were all milked by hand; the men did not wash their hands during the milking. They only washed their hands when they came out to milk the cows, and then from a private cistern at the house. The water in this cistern at the house came from the irrigation canal on the West road. I kept the parts of the milking machine in water between the milkings. Under ordinary conditions, once a week everything was cleaned thoroughly. But water was put into the

(Deposition of Albert John Reed.)

teat cups all the time. The teat cups and other parts connected with them were the only parts kept in water, to keep them [228] from hardening. Skinner was not keeping the teat cups in water when I came down the first time. I kept these teat cups in water and they stood in a pail of water over night when I was not using them. This water came from this water hole of which we have been speaking, in the same fashion as the other water used for dairy utensils; put into this tank in which was the exhaust pipe of the engine and was then taken out from there and put into the machine. Skinner did have some sick calves. They were taken out of the pen and put on the outside. Then they were outside they got into this yard, and I saw one or two in there. The water that was used for the purpose of washing the dairy utensils came in direct contact with the exhaust pipe and it boiled.

Cross-examination.

Mr. SWING.—Q. For whom did you install, for whom were you working when you installed the mechanical milker?

Mr. PARKE.—We object to that question on the ground that it is not proper cross-examination and was not called for in the direct examination.

The COURT.—Objection overruled.

Mr. PARKE.—Note an exception.

EXCEPTION NUMBER 26.

And said defendant, said Sharples Separator Company, a corporation, now assigns said ruling as error.

(Deposition of Albert John Reed.)

A. I was working for the Sharples Separator Company.

Q. How long have you been working for them, approximately?

Mr. PARKE.—We object to that question on the ground that it is not proper cross-examination and was not [229] called for in the direct examination.

The COURT.—Objection overruled.

Mr. PARKE.—Note an exception.

EXCEPTION NUMBER 27.

And said defendant, said Sharples Separator Company, a corporation, now assigns said ruling as error.

A. I started to work for them on the first of June, 1913, and continued to work for them until January 15, 1915. Skinner put the planks in the gutter on the North side of his shed not more than a week after I suggested it; I made the suggestion the last time I got down there,—the last of October. I am acquainted with a number of other dairies in Imperial County, and have installed milkers upon them.

Q. About how many dairies are you acquainted with down there?

Mr. PARKE.—We object to that question upon the ground that it is not proper cross-examination.

The COURT.—Objection overruled.

Mr. PARKE.—Note an exception.

EXCEPTION NUMBER 28.

And said defendant, said Sharples Separator

(Deposition of Albert John Reed.)

Company, a corporation, now assigns said ruling as error.

A. I am acquainted with some half a dozen down there. The water hole to which I refer as being near the milk-house, was not fenced when I first went down there; it was not fenced shortly after I went there the first time; I first noticed that it was fenced some time in June. The first time I saw the calf in this water was before it was fenced. I did not see any in the water after it was fenced. The cattle had other drinking places, and only occasionally came [230] to this place to drink. This water in this water hole was settled water, and the water which was put into the drinking hole was also settled water. With reference to this water in this water hole near the milk-house, when I testified the plant, I instructed Mr. Skinner in the proper use and care of the milking machine and its parts, and how to clean them. I demonstrated to him by cleaning them myself. I used the same water; the water came from this water hole.

Q. Did you ever warn Skinner not to use water out of this water hole?

Mr. PARKE.—We object to that question on the ground that it is not proper cross-examination.

The COURT.—I will overrule the objection.

Mr. PARKE.—Note an exception.

EXCEPTION NUMBER 29.

And said defendant, said Sharples Separator Company, a corporation, now assigns said ruling as error.

(Deposition of Albert John Reed.)

A. When I went down in June and July I did.

Q. What was done?

Mr. PARKE.—We object to that question as not proper cross-examination.

The COURT.—Objection overruled.

Mr. PARKE.—Note an exception.

EXCEPTION NUMBER 30.

And said defendant, said Sharples Separator Company, a corporation, now assigns said ruling as error.

A. Boiled water was used then; he followed my suggestion.

Q. How many times were you there, at Skinner's place?

Mr. PARKE.—We object to the question as not proper [231] cross-examination.

The COURT.—Objection overruled.

Mr. PARKE.—Note an exception.

EXCEPTION NUMBER 31.

And said defendant, said Sharples Separator Company, a corporation, now assigns said ruling as error.

A. Well, I have been there a dozen times, off and on. I was there first in the first part of February, and remained for twelve or fourteen days. The occasion of my being there at *time* time was to install a mechanical milker. I was next there in the latter part of March, or the first of April.

Q. About how long were you there at that time?

Mr. PARKE.—We object to the question as not proper cross-examination.

(Deposition of Albert John Reed.)

The COURT.—Objection overruled.

Mr. PARKE.—Note an exception.

EXCEPTION NUMBER 32.

And said defendant, said Sharples Separator Company, a corporation, now assigns said ruling as error.

A. Two or three milkings.

Q. What was the occasion of your being there that time?

Mr. PARKE.—Objected to as not proper cross-examination.

The COURT.—Overruled.

Mr. PARKE.—Note an exception.

EXCEPTION NUMBER 33.

And said defendant, said Sharples Separator Company, a corporation, now assigns said ruling as error. A. Trouble.

Q. What was the trouble?

Mr. PARKE.—Objected to as not proper cross-examination. [232]

The COURT.—Overruled.

Mr. PARKE.—Note an exception.

EXCEPTION NUMBER 34.

And said defendant, said Sharples Separator Company, a corporation, now assigns said ruling as error.

A. Skinner's trouble with his cows.

Q. What was the occasion of your being called in?

Mr. PARKE.—Objected to as not proper cross-examination.

The COURT.—Overruled.

(Deposition of Albert John Reed.)

Mr. PARKE.—Note an exception.

EXCEPTION NUMBER 35.

And said defendant, said Sharples Separator Company, a corporation, now assigns said ruling as error.

A. I was the expert in charge.

Q. An expert in charge for whom?

Mr. PARKE.—Objected to as not proper cross-examination.

The COURT.—Overruled.

Mr. PARKE.—Note an exception.

EXCEPTION NUMBER 36.

And said defendant, said Sharples Separator Company, a corporation, now assigns said ruling as error.

A. Sharples Separator Company.

Q. When were you there next?

A. I was there in May, next.

Q. How long were you there at that time?

Mr. PARKE.—Objected to as not proper cross-examination.

The COURT.—Overruled.

Mr. PARKE.—Note an exception. [233]

EXCEPTION NUMBER 37.

And said defendant, said Sharples Separator Company, a corporation, now assigns said ruling as error.

A. I was there a couple of days, anyhow.

Q. What was the occasion of your being there that time? A. Trouble.

Q. And when were you next there, if you remem-

(Deposition of Albert John Reed.)

ber? A. June 25th to July 7th.

Mr. PARKE.—We object to this line of questioning as not being cross-examination.

The COURT.—Overruled.

Mr. PARKE.—Note an exception.

EXCEPTION NUMBER 38.

And said defendant, said Sharples Separator Company, a corporation, now assigns said ruling as error.

Q. How long were you there that time?

A. June 25th to about July 7th.

Q. What was the occasion of your being there that time?

Mr. PARKE.—Objected to as not proper cross-examination.

The COURT.—Overruled.

Mr. PARKE.—Note an exception.

EXCEPTION NUMBER 39.

And said defendant, said Sharples Separator Company, a corporation, now assigns said ruling as error.

A. Skinner stopped his machine and I was sent for to restart it.

Mr. PARKE.—I move to strike out the answer of the witness.

Said motion to strike out was then and there denied [234] by said court, to which ruling said defendant, said Sharples Separator Company, a corporation, then and there duly excepted, and now assigns said ruling as error.

EXCEPTION NUMBER 40.

Q. You say you were sent to Skinner's place—

(Deposition of Albert John Reed.)

by whom were you sent?

Mr. PARKE.—Objected to as not proper cross-examination.

The COURT.—Overruled.

Mr. PARKE.—Note an exception.

EXCEPTION NUMBER 41.

And said defendant, said Sharples Separator Company, a corporation, now assigns said ruling as error.

A. The Sharples Separator Company: and while there that time on the Skinner ranch, I restarted the machine. It was operated by Skinner's lads, a boy and a hired man under my direction.

Q. When next were you there?

Mr. PARKE.—We object to the question as improper cross-examination.

The COURT.—Objection overruled.

Mr. PARKE.—Note an exception.

EXCEPTION NUMBER 42.

And said defendant, said Sharples Separator Company, a corporation, now assigns said ruling as error.

A. October 20th, to December 20th.

Q. What was the occasion of your being there at that time?

Mr. PARKE.—We object to the question on the ground that it is improper cross-examination.

The COURT.—Objection overruled.

Mr. PARKE.—Note an exception. [235]

EXCEPTION NUMBER 43.

And said defendant, said Sharples Separator Company, a corporation, now assigns said ruling as error.

A. To take charge of the mechanical milker. I

(Deposition of Albert John Reed.)

was working at that time for the Sharples Separator Company. While there on the Skinner ranch at that time, I operated the milker.

Mr. PARKE.—All of this is objected to as not proper cross-examination.

The COURT.—Objection overruled.

Mr. PARKE.—Note an exception.

EXCEPTION NUMBER 44.

And said defendant, said Sharples Separator Company, a corporation, now assigns said ruling as error.

The WITNESS.—(Continuing.) Cows were milked by hand when I went there on my second visit; there were two or three that had swollen quarters, that were being milked by hand. On my third visit, some half dozen cows, perhaps, were being milked by hand.

When I got there in June they were all being milked by hand. They had quit using the milker and I started it again.

Mr. PARKE.—All of this we object to as not being proper cross-examination.

The COURT.—Objection overruled.

Mr. PARKE.—Note an exception.

EXCEPTION NUMBER 45.

And said defendant, said Sharples Separator Company, a corporation, now assigns said ruling as error.

The WITNESS.—(Continuing.) I started the milker on all the cows.

Q. After that, were any of the cows taken off for any [236] reason and milked by hand?

Mr. PARKE.—We object to the question as not

(Deposition of Albert John Reed.)

being proper cross-examination.

The COURT.—Objection overruled.

Mr. PARKE.—Note an exception.

EXCEPTION NUMBER 46.

And said defendant, said Sharples Separator Company, a corporation, now assigns said ruling as error.

A. Some dozen or so were taken off and milked by hand and six or eight were isolated. I was in charge at that time, and this was done under my instruction.

Q. For what reason?

Mr. PARKE.—We object to the question upon the grounds that it is not proper cross-examination, and is asking for the opinion and conjecture of the witness, and not for a statement of fact.

The COURT.—Objection overruled.

Mr. PARKE.—Note an exception.

EXCEPTION NUMBER 47.

And said defendant, said Sharples Separator Company, a corporation, now assigns said ruling as error.

A. The condition of the cows warranted it.

Mr. PARKE.—I move to strike out the answer of the witness as not responsive.

The COURT.—Motion denied.

Mr. PARKE.—Note an exception.

EXCEPTION NUMBER 48.

And said defendant, said Sharples Separator Company, a corporation, now assigns said ruling as error.

Q. What was the condition of the cows? [237]

Mr. PARKE.—We object to the question as incompetent, irrelevant and immaterial, nor proper cross-

(Deposition of Albert John Reed.)

examination, and asking for the opinion and conjecture of the witness, and not a statement of fact.

The COURT.—Objection overruled.

Mr. PARKE.—Note an exception.

EXCEPTION NUMBER 49.

And said defendant, said Sharples Separator Company, a corporation, now assigns said ruling as error.

A. The whole udder was swollen, there was high fever and individual cows were in very bad condition.

Q. How soon did this condition appear after you had started the milker upon them?

Mr. PARKE.—We object to the question as not being proper cross-examination.

The COURT.—The objection is overruled.

Mr. PARKE.—Note an exception.

EXCEPTION NUMBER 50.

And said defendant, said Sharples Separator Company, a corporation, now assigns said ruling as error.

A. Directly. When I went back in October, I started the milker on one string of 30 cows.

Q. After you started the milker on that string of 30, were any taken off and milked by hand?

Mr. PARKE.—Objected to as not proper cross-examination.

The COURT.—Objection overruled.

Mr. PARKE.—Note an exception.

EXCEPTION NUMBER 51. [238]

And said defendant, said Sharples Separator Company, a corporation, now assigns said ruling as error.

A. Some two or three during the first two weeks, and then one or two as warranted, later on.

(Deposition of Albert John Reed.)

Q. Why was the milker taken off these cows?

Mr. PARKE.—We object to the question on the grounds that it is not proper cross-examination, not having been brought out in a direct examination, and calling for the conjecture of the witness, and not for a statement of facts.

The COURT.—Objection overruled.

Mr. PARKE.—Note an exception.

EXCEPTION NUMBER 52.

And said defendant, said Sharples Separator Company, a corporation, now assigns said ruling as error.

A. Owing to swollen quarters. Fresh cows come in off and on. When I started in February, somewhere around 90 cows, some three strings were milking.

Q. I will ask you if Skinner was getting as much milk in quantity in December when you quit, as he was in February, when the milking machine was started on these cows, from those on which the milking machine had been used?

Mr. PARKE.—We object to the question on the ground that it is not proper cross-examination.

The COURT.—Objection overruled.

Mr. PARKE.—Note an exception.

EXCEPTION NUMBER 53.

And said defendant, said Sharples Separator Company, a corporation, now assigns said ruling as error.

A. In my opinion he was not.

Mr. PARKE.—I move to strike the answer out as not [239] responsive, and not based upon a statement of facts.

(Deposition of Albert John Reed.)

The COURT.—Motion denied.

Mr. PARKE.—Note an exception.

EXCEPTION NUMBER 54.

And said defendant, said Sharples Separator Company, a corporation, now assigns said ruling as error.

The WITNESS.—(Continuing.) It is a fact that some of Skinner's cows, after this inflammation had set up in their udders quit giving milk altogether.

Q. And some quit giving milk in one quarter, and some in more quarters?

Mr. PARKE.—We object to the question as not proper cross-examination.

The COURT.—Objection overruled.

Mr. PARKE.—Note an exception.

EXCEPTION NUMBER 55.

And said defendant, said Sharples Separator Company, a corporation, now assigns said ruling as error.

A. Yes.

Redirect Examination.

I did not keep any count of the amount of butter fat or milk from any of these cows, so that I could not accurately state just how much less there was from any particular cow in the herd at any particular time. Neither I nor Skinner, nor anybody kept a table showing how much these cows gave at any time. That is done in some dairies.

Mr. PARKE.—I desire to read in evidence in this cause the deposition of F. A. Frank taken for and on behalf of the defendant, Sharples Separator Company. Said deposition [240] was thereupon received and read in evidence in said cause and is in words and figures as follows, to wit:

Deposition of Frederick A. Frank, for Defendant.

Direct Examination.

My name is Frederick A. Frank. I reside in Philadelphia. I am employed by the Sharples Separator Company and work for them in various capacities. I was employed by the Sharples Separator Company during the year 1914, as sales-manager of the San Francisco office. I left the employ of the Sharples Company in January, 1916. My duties as sales-manager of the Sharples Separator Company was to conduct the sales work in connection with the instructions of the home office and look after the business generally. I know F. L. Briggs. He was in the employ of the Sharples Separator Company. I could not give the period of time. He was there during 1914. He was there when I went with the company and he was still there with the company when I left. His position was milking machine expert. His duties were to look after the milking machines, their installation and troubles which customers occasionally have and see that that particular line of work was carried on properly, and to instruct the dealers and agents in the proper use of the machine. He received instructions from me and worked under my supervision.

I know W. W. Skinner. We received in March, 1914, an order for the mechanical milker from W. W. Skinner, which order was in accordance with our usual method of business, and the milking machine was delivered to him and set up in accordance with our usual method. The order was received on the

(Deposition of Frederick A. Frank.)

usual printed form as offered in evidence. I instructed [241] F. L. Briggs to go to the ranch of W. W. Skinner, at El Centro in 1914. Skinner was complaining that he thought his milker was not operating properly, and in accordance with our usual custom, I sent Briggs there to see if he could not be satisfied, or rather, I sent Briggs there to see if he could not overcome his difficulty. I do not remember exactly what instructions were given to Briggs, but simply wrote or told Briggs personally to follow out his usual custom or usual practice in attempting to satisfy customers or to correct any faulty installation, and find out what was wrong and straighten out the trouble.

I know Albert J. Reed. He was with the Sharples Separator Company as a milking machine expert for a period of about nine months, and his employment ended with us prior to October, 1914. I think he had not been working for us for two or three weeks prior to October 20, 1914; his account had been squared up and been checked out. Mr. Reed was engaged to install milking machines and to instruct the purchasers of the same in their proper use. He worked under the direction of the San Francisco office. He might have been working for us some time in October, but was not working for us on October 20, 1914, or thereafter; I could not say how long before October 20. My best judgment is that he was not working for us for two or three weeks before the 20th of October, 1914. I do not know whether or not Reed went to the ranch of W. W. Skinner dur-

(Deposition of Frederick A. Frank.)

ing the month of October, 1914. Mr. Reed left the San Francisco office, and it is my belief that he left for the W. W. Skinner ranch. He came in to call upon me before he went to the ranch of W. W. Skinner. I advised Mr. Reed that if he would call upon Mr. W. W. Skinner he could [242] undoubtedly secure employment with him as a milking machine operator; at that time Mr. Reed was not in the employ of the Sharples Separator Company. At the time when Mr. Reed was at the ranch of W. W. Skinner in October, November and December, 1914, I do not know in whose employ he was; he was not in the employ of the Sharples Separator Company. I didn't send Reed to the ranch of W. W. Skinner, as an employee of the Sharples Separator Company. On October 20, 1914, when Reed went to the place of W. W. Skinner at El Centro, Reed was no longer in the employ of the Sharples Separator Company, and I gave him no instructions as to what his future work would be, but suggested to him that if he was looking for employment he could possibly obtain it from W. W. Skinner. I did not give him any instructions to go back to the Skinner place and restart the milking machine and endeavor to get it running right, because he was not in the employ of the Sharples Separator Company.

Cross-examination.

I believe that Mr. Skinner bought the milker which is the subject of this suit in March, 1914. He signed a written order such as was referred to by Mr. Sharples and a copy of which has been offered in evi-

(Deposition of Frederick A. Frank.)

dence—Plaintiff's Exhibit 1; so that the order and the guarantee on the back thereof was the contract at that time which was made between me and him, I representing the Sharples Separator Company, and he acting for himself. The machine was furnished to him and set up either immediately thereafter, or very shortly thereafter, within a reasonable time. He first complained to me that this milker had damaged his cattle in June, 1914, [243] I sent a man down to advise Mr. Skinner what was causing the difficulty; he was to do anything that was necessary to straighten things out. I believe it was the same Albert J. Reed; I am not sure whether Briggs went down in answer to the first complaint. Reed was down there during the time between June 20 and July 7. I do not know whether he was at the Skinner ranch all that time or not. There were several other machines in the same valley, and he was around among them all. I am not able to state definitely whether or not Reed operated Skinner's machine during the period from June 20 to July 7, 1914. The Sharples Separator people paid for his services during that period. He reported as to his operations on the Skinner milker. He reported to me in writing. I received the reports he made out; I do not know where they are now; they are somewhere in the correspondence. I cannot answer where they were at the time I left the employ of the Sharples Separator Company. I do not know where they were. They might have been enroute with somebody. It is my belief that shortly after Reed left, on July

(Deposition of Frederick A. Frank.)

7th, Mr. Skinner advised us that the machine was still unsatisfactory. I sent F. L. Briggs down to the Skinner place after July, 1914. I do not know whether Briggs made more than one trip, but I do know that he went down some time during October, 1914. He might have gone down in August, 1914. He advised me that Skinner was still dissatisfied. I suggested that if it could be arranged, Skinner should hire one of our men that we were letting go. It was pursuant to that suggestion that he afterwards asked Mr. Reed to come on the 20th of October. I sent Reed down pursuant to that suggestion. I do not [244] know the exact time Mr. Reed stayed down there. It was some time; I believe Reed wrote me several letters in regard to the results he was getting, and that I replied to the letters. I do not remember whether I kept copies of the letters I wrote him. We made a practice of keeping copies of all official outgoing letters,—except what letters were written personally. I do not know where are Reed's letters to me during the period from October 20, 1914, while he was down at Skinner's place. They were put in the files with the rest of the daily correspondence. I do not think I shipped those letters to the home office at West Chester, while I was still in charge of California. About October, 1914. Skinner talked to Briggs about his employment of a competent man. I do not know whether Briggs is still employed there. Shortly after Reed went down there on October 20, 1914, he asked Skinner for his salary or part of it. Then Mr. Skinner advised him that he, Reed, was

(Deposition of Frederick A. Frank.)

working for the Sharples Separator Company, and Reed advised me of Skinner's attitude, and I advised Reed that such was not the case, that he was working for Skinner; and I believe that Reed notified Skinner of this fact, too.

Mr. SWING.—I ask that the last statement be stricken out.

The COURT.—That will be stricken out.

Mr. PARKE.—Note an exception.

EXCEPTION NUMBER 56.

And said defendant, said Sharples Separator Company, a corporation, now assigns said ruling as error.

The WITNESS.—(Continuing.) I don't know who actually paid Reed; the Sharples Separator Company paid him no [245] salary during the period from October 20th to December 20, 1914. We paid his railroad fare. The Sharples Separator Company did not pay his wages. We did not pay for his services during the period I have just mentioned. The company paid his railroad fare down. He came back with a big yell, "He never got any money from Skinner." I did not pay his railroad fare down until after he returned. It was my opinion he got no wages while he was down there. I do not think that he was taken into the employ of the Sharples Separator Company after that—not as long as I was in the employ, any way. I do not remember getting a telegram from Reed on December 20, 1914, while he was still down at Skinner's place—I have no recollection. If there is one it would be in the files of the Sharples Separator Company. To

(Deposition of Frederick A. Frank.)

my knowledge, Reed was an experienced and skillful operator of such a machine as Mr. Skinner bought. While Reed was down there from October 28, 1914, and thereafter, I did not give him any directions at all. Reed reported from time to time as to how his work was going along, and one time things were going very nice, and in a day or two he would have two or three cows go wrong. I was interested in keeping Skinner satisfied, because I was hoping to get a lot more business down there. I asked him to write to me, keeping me advised of conditions. I am now *in the* employed by the Sharples Specialty Company; the president of this company is P. T. Sharples, a son of P. M. Sharples. P. T. Sharples has no connection with the Sharples Separator Company; that company sells certain manufactured goods.

Mr. PARKE.—The defendant rests. [246]

**Testimony of C. F. Boarts, for Plaintiff (in
Rebuttal).**

Thereupon C. F. BOARTS was called as a witness in behalf of the plaintiff, in rebuttal, and having been first duly sworn, testified as follows:

Direct Examination.

I live eight miles northeast of Brawley, in Imperial Valley, California. My business is that of general ranching and dairying. I have been in the dairy business this time five years last August. I have handled milk cows off and on practically all my life. I am familiar with the common diseases of cows in

(Testimony of C. F. Boarts.)

a general way. I have treated my own cows when some trouble existed. I am familiar with the operation of a Sharples mechanical milker. My experience is based on use on my personal ranch and observation on several others. I operated a Sharples mechanical milker on my ranch a little better than two months. I know W. W. Skinner, the plaintiff in this case. I was at his place the latter part of February or the first part of March, 1914, after he started to use the Sharples mechanical milker. I looked around his place and noted the conditions. He had a very good dairy-house; his dairy-barn was—

Mr. PARKE.—We move to strike out the answer of the witness as to “very good” as to being a conclusion of the witness.

The COURT.—Motion denied.

Mr. PARKE.—Note an exception.

EXCEPTION NUMBER 57.

And said defendant, said Sharples Separator Company, a corporation, assigns said ruling as error. [247]

The WITNESS.—(Continuing.) His dairy barn had a cement floor all the way through; I believe there was one side that had a gutter that was not finished. He had his pools fenced at that time, and the general condition as to cleanliness in the barn was good. There was no loose manure in the gutters and the cleanliness of the place struck me as being very good. The water supply was not out to his pool, but was close by, and the water looked good in the pool. I have seen three of these Sharples me-

(Testimony of C. F. Boarts.)

chanical milkers work; I have seen Mr. Skinner's machine working on one occasion. In another dairy, I seen another work on two different occasions; and in my own, covering the period that it was in operation there. The plaintiff's milking machine was similar to my own.

The COURT.—It is stipulated here there is only one machine.

Mr. PARKE.—We so stipulate.

The WITNESS.—(Continuing.) In my opinion, the Sharples Separator machine was not a successful machine; the machines under my observation have failed to milk the cows without injury to the cows.

Cross-examination.

The operation of the machine caused swollen udders. By "the operation of the machine" I mean the act of drawing the milk and the functions it was supposed to perform causing swollen udders. By "drawing of the milk" I mean from the cow, by the different machinery. This (indicating machine on the floor) is like the machine that I used. Let me see the teat cup. (Receiving teat cup.) It seems to me there was a little difference in the teat [248] cup of the machine, the one that was furnished me; it seems to me there was a difference. If it should appear from the testimony that the Sharples Separator Company never made but one form of teat cup, I would not say that I was infallible as to whether this teat cut was like the one furnished me, but there seemed to be some difference in that. I am unable to state to the jury what part of the machine was

(Testimony of C. F. Boarts.)

wrong, or I would have corrected the trouble. The machine drew the milk from the cows. So far as I could see, the machine did not work right from a mechanical standpoint—it did not draw the milk and perform its mechanical functions all right; if it had *of drewed* the milk and performed its mechanical functions all right, it would not have done any injury. As to whether, leaving aside the claim of the effect it had on the cows, there was anything wrong about the mechanical operation of the machine, if the machine operated as their expert claimed it should.

Q. If it had not hurt your cows, you would have no complaint about your machine and the way it operated?

A. I am not certain about that. As to what causes me to be uncertain there is quite a loss of butter fat or milk, and whether it is wholly attributable to swollen quarters, or whether it would come from the milker if these quarters had not occurred, I am not able to say. As to whether the machine got as much milk from the cows as I should from hand-milking, it did not from some of the cows. I did not keep an individual record, although we had a general record coming from what each cow was producing; that is, to put it down in pounds and tenths of pounds, I did not keep a regular record. I operated my [249] machine part of the time and my milker operated it part of the time. I believe my milker was about 27 years of age to the best of my knowledge. My cows got the water from a tank

(Testimony of C. F. Boarts.)

that supplies the house and other parts of the ranch. That water all comes from the common source, the Imperial Canals, the Colorado River, the only source of supply we have. That is not true of every ranch in the Imperial Valley; there is a few wells has been drilled; but in 1914 practically everybody who had dairy herds was using water from these canals, and practically every dairy herd to-day. I visited Mr. Skinner's ranch the latter part of February, 1914, or the first of March of the same year. It is my recollection that the pools were fenced at that time. I had no knowledge before or after that date as to whether Mr. Skinner had permitted his cows to walk into the water ditches. I permitted my cows to go into the water ditches for possibly two months after the time I first put the cows on the ranch—a little better than five years there was possibly two months. I washed my teat cups in water that was taken from the tank that we used for domestic as well as other purposes; we did not boil the teat cups after we had milked—not the rubber parts. By way of sterilization, the teat cups were washed with warm water—well, they were rinsed with cold water, washed with warm water with the brushes as directed, and then put in lime water as directed. Personally, I consider a cement floor an improvement to a dairy barn; it adds to the facilities for keeping that barn clean. I use stanchions; I consider stanchions an essential and necessary part of a good dairy barn in feeding; I consider them [250] a benefit in handling of the feeding.

Testimony of H. D. Nye, for Plaintiff (in Rebuttal).

Thereupon H. D. NYE was called as a witness for the plaintiff, in rebuttal, and said H. D. Nye, having been first duly sworn, testified as follows:

Direct Examination.

My name is H. D. Nye. I live at El Centro. I have lived there a little over two years. I have held an official position—inspector of the State Dairy Bureau. I held that position with reference to Imperial County from August 28, 1914, until June 1st, 1916. My duties as such were the inspection of dairies as to their sanitary condition, and the inspection of retail milk routes and creameries having to do with the production and sale of milk. I visited Mr. Skinner's dairy in my official capacity more than once—about five times. The first time was near the first of of September, 1914. The second time was the latter part of September, 1914; the third time was about the middle of October, 1914; and the fourth time in December, 1914. The sanitary condition of that dairy was good. I never found a mud hole in that dairy—I mean in the corrals or around the buildings. The barn was clean; the milk-house was in good shape; the water holes where the cows drank, the settling-basins, as we call them, were fenced, and planked so the cows could drink out of them without getting into them, and the water was as clear as we have ever been able to get water in the Imperial Valley. I have never seen any stock or any foreign matter in the ponds of any description. The utensils, both the milking machine and other uten-

(Testimony of H. D. Nye.)

sils I saw there, were always clean and sweet smelling. The cows once in a while would be a little muddy [251] around the lower part of the legs, but aside from that were in very good condition.

Cross-examination.

Skinner had a cement floor; it is not compulsory, but it does make the dairy that much cleaner. I would say that a cow shed in which cows were kept that did not have either a cement or board floor is a sanitary dairy. If they milk cows in the yard, and only clean the droppings out once a month, that would not be a sanitary dairy. It is more sanitary when they have a wooden or cement floor; a cement floor is considered the most sanitary. Stanchions are an advantage or benefit to a dairy barn, whether you use a milking-machine or not.

Q. Is it not a fact, Mr. Nye, that dairy conditions in the Imperial Valley during the year 1914, or during the time when you were State Dairy Inspector down there, were such that milk and dairy products were not permitted to be shipped from Imperial Valley into Los Angeles City for consumption.

Mr. SWING.—Objected to as incompetent, irrelevant and immaterial and not proper cross-examination.

The COURT.—Objection sustained.

Mr. PARKE.—Note an exception.

EXCEPTION NUMBER 58.

And said defendant, said Sharples Separator Company, a corporation, assigns said ruling as error.

The WITNESS.—(Continuing.) Mr. Skinner did

(Testimony of H. D. Nye.)

not ever make any application to me for a permit or certificate for his dairy as to cleanliness. I did not, acting on behalf [252] of the Dairy Inspector's Office, grant permits to sell milk to customers; that was not done in Imperial Valley at that time, to my knowledge. I would not consider a dairy which had a mud hole a sanitary dairy.

Testimony of H. Rodgers, for Plaintiff (in Rebuttal).

Thereupon H. RODGERS was called as a witness on behalf of the plaintiff, in rebuttal, and said H. Rodgers being first duly sworn, testified as follows:

Direct Examination.

My name is H. Rodgers. I live at El Centro. I have lived there about seven years. I was inspector of the State Dairy Bureau, and have been County Health Officer there four years. I was there in the year 1914. I started on that position five years ago; I mean both positions; I held both positions at the same time. I know W. W. Skinner and where his dairy is. I have visited it. I visited his dairy prior to the time he was on that land. I know when he came to the ranch. After he came there, I could not say how frequently I visited the ranch, but it was very frequently, probably two or three days a week; he lived two or three miles from me. I am acquainted with the sanitary conditions during the early part of 1914, and the sanitary conditions on that ranch were good.

(Testimony of H. Rodgers.)

Cross-examination.

The conditions were not more sanitary after he put in his cement floor in the place where he milked his cows, than they were before. The milk-house is more sanitary if a cement or some kind of a hard floor that you can flush out with water than an ordinary board floor or ground. Where the dairy herd are kept on a floor, [253] kept under a shed, conditions are not as sanitary as in the open, where the sun strikes them and the place is cleaned out. I would not consider a yard sanitary where the cows were kept over night, where they were being milked in a small yard and where the yard was cleaned out only once a month. If it was cleaned out every two or three days the way Mr. Skinner's was—

Q. If Mr. Skinner testified he only cleaned his barn once a month, would you consider it sanitary?

A. I would not like to take Mr. Skinner's testimony, if he said so, because I know different. I did not issue any permit to Mr. Skinner to sell milk to customers. He did not have a permit to sell his milk. I do not know it to be the Los Angeles ordinance that they were required to procure a permit before they could ship to Los Angeles.

Testimony of Dr. R. W. Ridder, for Plaintiff (in Rebuttal).

Thereupon Dr. R. W. RIDDER was called as a witness for plaintiff, in rebuttal, and after having been first duly sworn, testified as follows.

Direct Examination.

By profession I am a veterinary surgeon and den-

(Testimony of Dr. R. W. Ridder.)

tist. I practiced in Holtville, Imperial County. I have practiced in Imperial County about four years. I am the Deputy County Inspector,—deputy county veterinarian. The largest portion of my practice is included in the dairy industry. I have taken two years in the Chicago Veterinary College, and one year in the McKillip Veterinary College, went to Wisconsin and passed the State Board examination at Madison, practiced two years after I finished school, came to California and passed the State Board [254] examination at Sacramento. It will be four years in January that I have practiced in California. I have come in contact with quite a number of the Sharples mechanical milkers in various parts of my community—probably eight or ten. I know the general principle on which they operate. I have read the instructions they send out with the machine and am familiar with them. This machine operated according to those instructions that I saw. They were not successful on account of the irritation—the constant suction producing irritation on the udder; it hurts the cow's teats; it sets up an inflammation—mammitis.

By Mr. SWING.—Q. Doctor, assume that a herd of dairy cows were being milked, one string by a milker and another string by hand, and that the only cases of swollen quarters to appear in the herd appeared in the cows that milked by the mechanical milker, and that when that condition so appeared, the affected cows were taken off the milker and milked together with other cows being milked by

(Testimony of Dr. R. W. Ridder.)

hand, not being isolated, and that the milkers did not wash their hands between cows so milked, and the cows so affected got well, and the swollen quarters did not spread to a single other cow being milked by hand, what, in your opinion, would be the cause of the swollen quarters?

A. In my opinion, it would be a local irritation.

Q. Assuming that the plaintiff in this case, in February, 1914, had a healthy herd of some 90 dairy cows, all of which had been entirely free from garget since the herd had been collected, that plaintiff then bought a Sharples mechanical milker, which was installed by an expert operator, furnished by the defendant company, who after installing the [255] machine, instructed plaintiff, his son and hired man, in the care and operation of the milker and remained with plaintiff until he pronounced the machine properly installed and adjusted, and plaintiff and his milkers proficient in the operation of the machine; that thereafter the machine was cared for and operated by the persons who had received instructions as aforesaid, and was cared for and operated in accordance with the instructions furnished by the defendant company; that after the milking machine had been so used on plaintiff's cows for about 30 days, said cows began developing swollen quarters; that the cows showing swollen quarters were promptly taken off of the milker and thereafter milked by hand, following which hand-milking the swelling rapidly disappeared and did not reappear in the affected quarters, or in any other quarter of

(Testimony of Dr. R. W. Ridder.)

that cow, so long as she was milked by hand, or in the udders of any other cow in the herd, being milked by hand; that the cows which were being milked by hand were subjected to the same conditions of feed, water, quarters, exposure, surroundings and handling as were the cows being milked by the milker, i. e., all the cows whether milked by the milker or by hand, were subjected at all times to the same identical conditions and surroundings, with the one exception, that one part were being milked by the milker and the other part were being milked by hand, that notwithstanding which the cows which were being milked by the milker continued to develop swollen quarters so long as the milker remained in operation upon them, while in those being milked by hand the existing swelling rapidly disappeared and did not reappear so long as they were milked by hand, what, in [256] your opinion, was the cause of the swollen quarter? A. Local irritation.

Q. Caused by what?

A. Caused by constant vacuum, or constant suction of the teat cup on the udder.

Q. Assuming the facts stated in my previous question, and further, that on the 25th day of June, 1914, the defendant, the Sharples Separator Company, sent its expert operator to plaintiff's ranch and he took charge of all the plaintiff's cows and of the milking machine, and after thoroughly disinfecting the machine and the premises, began milking all of plaintiff's cows with the milker, including those cows which had theretofore had swollen quarters; that in

(Testimony of Dr. R. W. Ridder.)

a very short time the swellings reappeared in the cows which had theretofore had it, in an aggravated form, which became so intense in the case of about 17 cows as to stop the passage of milk from the udders; that said expert operator stopped operating the machine about July 7, 1914, and the milker was not again operated until about October 20, 1914; that in said interval all the cows were milked by hand and during that time no new cases of swollen quarters appeared; that on October 20, 1914, the milker was again begun by the same expert operator, who had operated from June 25th to July 7th, and he continued operating it on about 30 cows up until December 20, 1914; that the cows on which said milker was so operated were cows selected by said operator and which had not theretofore shown any udder trouble; that during those two months, between 8 and 12 of the cows being milked by the milker developed swollen quarters; that of the sixty odd remaining cows of the herd [257] being milked during the same period by hand, developed no new cases of swollen quarters; that the cows which were being milked by the milker and the cows that were being milked by hand during said period, were subjected at all times to the same identical conditions and surroundings, with the one exception, that the one part were being milked by the milker and the other part were being milked by hand; that said expert operator stopped operating the same machine on December 20, 1914, and the same has not since been operated on any of plaintiff's cows; that plaintiff has never had any such case or any similar

(Testimony of Dr. R. W. Ridder.)

case of swollen quarters in his herd, before beginning the use of the milker, and there has been no case of swollen quarters in his herd since the milking machine quit, what, in your opinion, was the cause of the production of additional swollen quarters?

A. What was the primary cause?

Q. The primary cause.

A. My impression is it was simply an irritation—local irritation.

Q. Produced by what?

A. Produced by—well, the milking machine; if it was not the milking machine the hands would produce it, the same as the milking machine.

Q. Would you say the cows had, under this statement, infectious mammitis, or not?

A. If they did, it was secondary, due to some primary cause.

Cross-examination.

If abscesses appeared in the cows referred to, belonging [258] to plaintiff, and pus ran out of the teats, and there was a complete sloughing away of the whole quarter, I would certainly say that there would be an infection present.

Q. So that if you were to see a cow, if you had seen plaintiff's cows, and had found them in that condition, where a number of quarters on the cows were swollen, and numerous cases where abscesses were running out of the teats, and some quarters were abscessed and running pus out, you would think they were infected, would you not, with infectious mammitis?

(Testimony of Dr. R. W. Ridder.)

A. You would have to have infection in order to have pus. Such condition certainly could result from a mere traumatic condition. The pus producing organisms are present in absolutely every case, in my opinion, of normal conditions of the udder, and until the udder is placed in a susceptible condition where the germs will enter abrasions through irritation, the udder has sufficient strength to resist infection until there is an irritation. It may be possible for a pathogenic micrococcus to attack a perfectly healthy tissue under a violent condition; but there must, in my opinion, be some infectious germ before it will result in the form of pus and the sloughing away of the quarters of the cow. I never made any bacteriological test of the milk of Mr. Skinner's cows, nor did I ever examine his cows.

Q. If there was found, from a bacteriological test of Mr. Skinner's cows, yellow micrococcus, or what is otherwise known as staphylococcus, and the physical appearance of the cow was a general depressed condition, she stood [259] about, seemed to have no life, appeared to be in a sick condition, and the udders were swollen and in many cases pus was running from the teats, and the quarters sloughed away, would you, then, in your opinion, say that cow was infected with noninfectious or infectious mammitis, finding the particular staphylococcus? Just answer my question whether you would diagnose the case that way.

(Testimony of Dr. R. W. Ridder.)

A. It would be infectious, but there is an issue between infectious diseases and contagious diseases. Staphylococci is not classed as contagious in no bacteriological book. It is present in every cow; it can be transmitted the same as any other disease, and if one take the germ from one cow and put it on another cow near the entrance of the hole, that would probably transfer it from one cow to another, but it must set up an irritation. It is contagious in the sense, if you touch it it may contaminate by inoculation. It would probably be just the same as a patient drinking out of a glass from which a tubercular or typhoid fever patient has just drunk—the healthy person might become inoculated with the disease germ by inoculation. The other is a contagious germ you are speaking of, typhoid, where they could take the micro or staphylo, or any of the *streptaccicci* without producing any bad features, but the micro is a contagious and more virulent germ than the staphylococcus. It is a fact that infection in the ordinary medical sense means the growth in the tissue, while contagious means the manner in which infection is transmitted; so that a germ may be infectious, and at the same time if it is transmitted from one cow to another one would say that it would be contagious also; a staphylococci [260] is both contagious, because it can be transferred from one cow to the other by inoculation, and it is infectious because when it gets into the cow's udder, it may result in forming pus. Staphylococci is not contagious, according to the bacteriological book where it says the micro, staphylo or strepto-

(Testimony of Dr. R. W. Ridder.)

coccus is contagious. By inoculation, it may be transferred from one cow to another where you have an abrasion. As to the entry through the teat duct, under normal conditions, there is no abrasion, and the germ, two to one would not produce any disease. It is there in every case. It may be possible that it would take a perfectly normal tissue and thus infect that tissue, but a contagious disease would enter a normal tissue and produce a disease where noncontagious diseases would not.

**Testimony of Dr. V. E. Cram, for Plaintiff (In
Rebuttal).**

Thereupon, Dr. V. E. CRAM was called as a witness in behalf of the plaintiff in rebuttal, and being first duly sworn, testified as follows:

Direct Examination.

I am a veterinary surgeon, practicing at El Centro, California. I have practiced six years. I held the office of Deputy County Veterinarian. I graduated from the State College of Colorado. I have had occasion, to a very limited extent, to observe the effect of the operation of the Sharples mechanical milker upon dairy cows at Mr. Skinner's ranch in Imperial Valley. I was called there about the last of June, 1914; I found a diseased condition of the udders of several cows, with the presence of pus in these udders; there were about 17 cows; those were bad; I made an examination of the cows, and the history of the [261] cows. After going over the cows thoroughly, under the process of elimination, and trying

(Testimony of Dr. V. E. Cram.)

to find out what was causing it, I decided that the primary cause of the condition of the cows I saw there was due to the milking machine.

Cross-examination.

I found pus in the teats of the cows; that indicates the presence of a germ. There are two or three kinds of germs—non-infectious and infectious germs. The presence of pus indicates the presence of a germ; this germ was not an infectious germ; it was not a contagious germ. I did not make any bacteriological test of the germs from Skinner's cows. As to whether they were not staphylococci, streptococci or micrococci, which by the better authorities are held to be infectious, I presumed it was staphylococcus; I presumed it was, my opinion is a presumption, and I made no bacteriological or chemical analysis.

Mr. PARKE.—We move to strike out the answers of the witness as to the causes here; it appears as a mere presumption on his part.

The COURT.—Motion denied.

Mr. PARKE.—Note an exception.

EXCEPTION NUMBER 59.

And said defendant, said Sharples Separator Company, a corporation, assigns said ruling as error.

Q. Do you mean to say that staphylococci or micrococci is not an infectious or contagious germ?

A. Well, there are several definitions of infection and contagion. Every authority describes them probably as a little different. You have your books before you. Will [262] you give me your definition of infectious germ? I do not think they are

(Testimony of Dr. V. E. Cram.)

infectious. I think the condition in Mr. Skinner's herd was caused by the bacteria in the udders; and that bacteria, by means of inoculation, may be transferred from one cow to another, just the same as you could carry any other kind of a germ. If the cow is affected with ordinary garget, or a traumatic condition, and there is present no infectious germ, it is possible to cure the cow by treating her properly. I do not know whether Mr. Skinner gave the cows any treatment or not. I prescribed the treatment. The treatment had practically no effect upon the cows. If it were a traumatic condition, the prescription that I gave would not have cured the cows—a different treatment for traumatic. I will have to qualify the answer. I didn't mean a different treatment for traumatic. The different treatment is for the severity of the case; after they get to a certain stage of development there is practically none. I did not tell Mr. Skinner that I thought that his was contagious mammitis. The treatment I prescribed was for external and internal applications. It is customary to treat a cow internally for an ordinary traumatic condition, according to the severity of the condition. If there is pus present in the udder, then you treat her internally; that is the sort of treatment.

Redirect Examination.

It takes the pus inside of 24 hours to appear after there has been an injury.

Testimony of Dr. C. A. Daudy, for Plaintiff (In Rebuttal).

Thereupon, Dr. C. A. DAUDY was called as a witness in behalf of the plaintiff, in rebuttal, and having been first duly sworn, testified as follows: [263]

Direct Examination.

I live at Brawley, Imperial Valley. I have lived in Imperial Valley about two years. I have been practicing as a veterinarian since 1913. I was graduated from the Chicago Veterinary College. I have been County Livestock Inspector, in Imperial County, for several years—I could not tell you how many; I believe it was called County veterinarian at one time. My practice includes the treatment of dairy cows. I have had occasion, in a little way, to observe the operation of a Sharples mechanical milker; I think it was at Mr. Boart's ranch. As to whether I understand the general principle upon which it operates, well, in a rough way, I do. Assuming that the water which was used at the Skinner place for washing the milker's hands, and also for washing the teat cups which are used in the Sharples mechanical milker to milk his cows, and part of the cows were being milked by the milker and part were being milked by hand, and some of the cows took down with swollen quarters, if the water was the source of the infection and trouble there would not be any difference in my opinion in the number of cows that were taken down being milked by hand, as compared with the number of cows taken down being milked by the milker.

(Testimony of Dr. C. A. Daudy.)

Q. Do you understand this pulsator, and that by turning this little faucet here you can turn on more pressure or less according to the different cow which is being milked, and in that way an adjustment is made to each cow—you understand that, do you?

A. I have been told that is the case, yes, sir. There is very apt to be a difference in the various quarters in the [264] same udder in pliability and in hardness or softness. If a mechanical milker was adjusted for the purpose of getting milk out of the teat which was hardest to milk, in my opinion, the teat was easier to be milked, would be milked first, probably, and be under a greater strain. As to the presence of pus producing bacteria, and of micrococcus, well, we are told that they are everywhere. As to whether in my opinion micrococcus is an infectious germ—whether it is so considered by authorities—why, I think so. In my opinion, I don't think it will attack healthy tissue or membrane.

Q. What, in your opinion, must *proceed* an invasion by this bacteria?

A. Well, there would have to be a favorable condition for the development of—

Q. Doctor, assuming that a herd of dairy cows were being milked, one string by a Sharples mechanical milker, and another string by hand, and that the only cases of swollen quarters to appear in the herd appeared among the cows milked by the mechanical milker, and that when the condition so appeared, the affected cows were taken off the milker and milked together with other cows then be-

(Testimony of Dr. C. A. Daudy.)

ing milked by hand, not being isolated, and that the milkers did not wash their hands between cows, and that the cows being milked by hand got well and the swollen quarters did not spread to a single other cow being milked by hand; what would you say as to what was the cause of the swollen quarter?

Mr. PARKE.—We object to the question as assuming only a partial statement of the uncontradicted facts as presented by the evidence, it appearing clearly from the [265] evidence that there was present in the milk from Skinner's cows certain germs designated as staphylococci, and it would be unfair to ask the witness the cause of such condition without setting forth that condition, and further, nothing is said about the manner in which the milking machine was operated and—

The COURT.—Well, I will overrule the objection.

Mr. PARKE.—Note an exception.

EXCEPTION NUMBER 60.

And said defendant, said Sharples Separator Company, a corporation, now assigns said ruling as error.

A. I would believe the teats there were being bruised by the milker. I would not say, under the conditions stated in the question, that the swollen quarter was an infectious condition. I think that the cup on this teat has bruised the quarter. The reason I think so was because there was no spreading of the disease there originally, and as soon as they took the teat cup off and went to milking these cows by hand, why, the trouble disappeared. The primary cause, in my opinion, of the condition stated was the

(Testimony of Dr. C. A. Daudy.)

bruising of the teat cup—of the teat by the teat cup.

Cross-examination.

If the cow's quarters became diseased near the point where they abscessed, I would say there was an infection of bacteria there.

Q. The condition might have arisen from an injury of most any kind, might it not; in other words, if a cow got kicked in the bag and then there should be an invasion of some infectious germ, such as staphylococci, streptococci, or [266] generated pus, that might be transmitted to all those cows in the herd by inoculation.

A. Well, that would have to be manual inoculation; you would have to punch it in there.

Q. Well, if it got on the outside of the teat?

A. I am not sure whether that is possible or not. It is possible to carry infectious germs from one cow to another by hand-milking, and probably that is usually the way infectious mammitis spreads among cows. I never made any examination of Mr. Skinner's cows; I never treated them. I never made any bacteriological examination of the milk. I do not know whether they had infectious mammitis or not. I never treated a herd which was afflicted with infectious mammitis. I don't know what caused the injury at Mr. Skinner's place; I never was at his place.

**Deposition of A. G. McCulloch, for Plaintiff (In
Rebuttal).**

Thereupon the deposition of A. G. McCULLOCH, a witness produced on behalf of the plaintiff, was received and read in evidence in this cause on behalf of the plaintiff in rebuttal, as follows:

Direct Examination.

My name is A. G. McCulloch, I live at West Moreland. I have been in Imperial Valley four years. I have handled dairy cows all my life with the exception of seven years. I have handled dairy cows all the time I have been in Imperial Valley. I am pretty well acquainted with the common diseases of cows. I know what mammitis is; it is an inflammation of the mammary gland. I have operated a Sharples mechanical milker, and have seen it in operation by others. I know the general principles on which it is operated. I have seen other mechanical milkers besides [267] the Sharples operated. My experience with the Sharples mechanical milker has been in Imperial Valley. I have milked both by hand and by mechanical milker. I operated a milker in the neighborhood of two months.

I know the plaintiff W. W. Skinner. I have never been at his place. Besides the mechanical milker which I operated, I saw J. J. Miller's Sharples mechanical milker operated. The other mechanical milkers that I have seen operated besides the Sharples were the Hinman and *and* D. L. K.

(Deposition of A. G. McCulloch.)

Q. What are some of the causes of mammitis, if you can say?

Mr. PARKE.—We object to the question as calling for an expert opinion of the witness, no foundation having been laid therefor.

The COURT.—The objection is overruled.

Mr. PARKE.—We note an exception.

EXCEPTION NUMBER 61.

And said defendant, said Sharples Separator Company, a corporation, now assigns said ruling as error.

A. Any injury inflicted upon the cow's udder will cause an inflammation. I know the general difference between infectious mammitis and noninfectious mammitis.

Q. I will ask you whether in your opinion noninfectious mammitis can be caused by the use of a Sharples mechanical milker in milking cows?

Mr. PARKE.—We object to the question as calling for a conclusion, no proper foundation having been laid, incompetent, irrelevant and immaterial, and the circumstances and conditions under which the operation of the machine might be made not being stated in the question. [268]

The COURT.—The objection is overruled.

Mr. PARKE.—We note an exception.

EXCEPTION NUMBER 62.

And said defendant, said Sharples Separator Company, a corporation, now assigns said ruling as error.

A. It can. Before starting to operate with the

(Deposition of A. G. McCulloch.)

Sharples mechanical milker I referred to a while ago, I had been instructed in the operation thereof by some representative of the Sharples Separator Company. I had been furnished with printed instructions, and I familiarized myself with those instructions.

Q. Did you follow them in operating the milker?

Mr. PARKE.—We object to the question as calling for a conclusion.

The COURT.—The objection is overruled.

Mr. PARKE.—We note an exception.

EXCEPTION NUMBER 63.

And said defendant, said Sharples Separator Company, a corporation, now assigns said ruling as error.

A. I did. After I started to use a Sharples mechanical milker, no representative of the company ever called to see how I was getting along until after the trouble showed up; then, some one did; and it was Munson. The manner in which I operated the milker was discussed with Munson; he said as far as his knowledge of the milker went, it was operated mechanically perfect; he did not criticise in any way the manner I had operated it; he said it was absolutely perfect in management and operation. The effect that I noticed on the cows following the use of the Sharples mechanical milker after milking the cows, was udder trouble; [269] it was consequently the drying up of the cows. Prior to the time the mechanical milker was put on those cows, I had been milking them by hand for two years or better,

(Deposition of A. G. McCulloch.)

I don't know exactly. We had no udder trouble with those cows before I put a mechanical milker on them. There was nothing except when a cow would become injured in some way, and that was only—you could confine it to maybe to one or two cases. It was where the cow would get stepped on that would generally leave a skinned spot on the udder, or on the teat. Aside from such injuries to the udder, there had been no udder trouble. Twenty-three out of forty-seven of my cows developed udder trouble after commencing to milk them with a mechanical milker; udder trouble developed in one or more quarters; I gave them no other treatment than taking the machine off the cows, and milking them by hand; the trouble disappeared. I always put the machine back on them after the swelling had disappeared and it would return in a shorter period of time than before; I always have to take it off in order to heal them up. I do not remember whether I ever had the machine back on a cow more than the second time or not. After the second time the cows were not returned to normal. You could always see the effect of the milker on the cow after she had been once injured. These cases of swollen quarters which I have referred to, which developed while I was using the mechanical milker were noncontagious and noninfectious.

Q. I will ask you whether in your opinion the Sharples mechanical milker can be operated upon dairy cows in Imperial Valley without seriously injuring some of them. [270]

(Deposition of A. G. McCulloch.)

Mr. PARKE.—We object to the question as calling for an expert opinion of the witness, no foundation having been laid, incompetent, irrelevant and immaterial, and presuming a state of facts not proven in this case at issue.

The COURT.—The objection is overruled.

Mr. PARKE.—We note an exception.

EXCEPTION NUMBER 64.

And said defendant, said Sharples Separator Company, a corporation, now assigns said ruling as error.

A. No, it cannot.

Q. What in your opinion would be the effect upon a string of dairy cows if milked any considerable length of time with a Sharples mechanical milker even though all the instructions furnished by the company are strictly followed?

Mr. PARKE.—We object to the question as calling for the expert opinion of the witness, presuming a state of facts not proven in this case, incompetent, irrelevant and immaterial.

The COURT.—The objection is overruled.

Mr. PARKE.—We note an exception.

EXCEPTION NUMBER 65.

And said defendant, said Sharples Separator Company, a corporation, now assigns said ruling as error.

A. It would eventually kill the cows if persisted in. It would develop an inflammation, and the inflammation would only be increased and aggravated by the use of the machine if persisted in.

Q. Assuming that the plaintiff in this case, W.

(Deposition of A. G. McCulloch.)

W. Skinner, had on his ranch in Imperial Valley a herd of healthy dairy cows, and that in February, 1914, he began milking the same with a Sharples mechanical milker, and in about thirty days [271] after he began milking them with a mechanical milker they began developing swollen quarters, and that as fast as he noticed a cow with swollen quarters took it off the machine and milked it by hand, and without any other treatment the cow returned to normal, and that when she was put back on the milker again she shortly developed one or more swollen quarters again and when taken off she again soon returned to normal, and that within a period of less than one year he had had approximately half of his cows at one time or another affected with the swollen quarters, what in your opinion would be the cause of the appearance of swollen quarters in his herd, assuming that the mechanical milker was operated strictly according to the instructions of the Sharples Separator Company, what in your opinion would be the cause of the swollen quarters?

Mr. PARKE.—We object to the question as calling for the expert opinion of the witness, and presumes a state of facts not proven in this case.

The COURT.—The objection is overruled.

Mr. PARKE.—We note an exception.

EXCEPTION NUMBER 66.

And said defendant, said Sharples Separator Company, a corporation, now assigns said ruling as error.

A. It would be the Sharples Milking machine.

(Deposition of A. G. McCulloch.)

Cross-examination.

If I had a herd of dairy cows in Imperial Valley under conditions similar to those under which Skinner's were kept, and while being milked by hand twenty per cent of the cows should have swollen quarters, the cause of that in my [272] opinion, will be pretty apt to be infectious garget. It could not just as well result from abuse from the manner in which the cows were milked. As to whether it is impossible for mammitis to develop other than by the use of a machine, when a milker gets so abusive that he hurts the cow he is not milking. In my knowledge, cows have had caked bags when milked by hand, but not from milking—from injury, being kicked or struck in some way.

Q. Isn't it possible for cows to have a caked bag if she isn't milked properly and milk is left standing in her bag for a considerable period of time?

A. If she isn't milked at all.

Q. Isn't it possible for mammitis to arise under those conditions?

A. Not from milking; if she is not milked at all, it might be possible for the cow's udder to become swollen. Infectious mammitis is caused by *steph-naecoccus* and *streppicocus bacillus* into the end teat and from there up into the mammary glands. Probably the quickest way to distinguish infectious mammitis from noninfectious mammitis by the outside appearance of the bag or udders of the cow is that infectious mammitis will spread from one quarter to another. It can be determined from the appear-

(Deposition of A. G. McCulloch.)

ance of the quarter. The infectious mammitis does not have the same feeling as the noninfectious.

Q. There is only one definite way to determine it, and that is by having a bacteriological test made of the milk, isn't it?

A. No. A contagious mammitis will spread and noncontagious will not spread. It did not spread among my herd. [273] A great many of my cows had swollen quarters, one after another, when the machine was on them, and in taking the machine off they stopped, and in milking them I tested them thoroughly as to whether it would spread or not, and it did not spread in any case, and also the discharge from the teat. It is impossible to mistake contagious from noncontagious. We get the discharge right in the start. It is possible for contagious garget to result into an abscess and pus running out of the udder to become contagious and infectious. As to whether any of my cows developed any abscess or anything of that kind, I answer yes; one cow developed an abscess, but it never reached the contagious garget state. I watched a mechanical milker operated in a place outside of Imperial Valley,—in Tulare County; at that time it had been operated only a short time; I do not recollect the date; two weeks or something like that; that machine was the B. L. K. I never saw a Sharples machine operated anywhere else. If the Sharples machines are being operated in other places that the Imperial Valley without injury to cows, I say it could not be operated here in Imperial Valley, because they have all failed;

(Deposition of A. G. McCulloch.)

if they have not handled it properly, it is because the company does not know how—they have sent their experts down here. If these people that have handled Sharples machines have not strictly followed instructions, it is the company's fault. I personally know that the company sent a man to C. F. Boarts. I do not remember exactly how long the man stayed there—it was a week or some such a matter.

Q. You don't know whether Mr. Skinner operated his machine [274] in accordance with instructions?

A. I never was down there; I don't know whether any of the other people here who gave up and abandoned the use of the Sharples machine followed instructions or not.

Q. You don't know whether Mr. Skinner's cows were infected with infectious mammitis or local mammitis, do you?

A. I never saw his cows. My machine worked all right from a mechanical standpoint; it was mechanically perfect; other than the injury which I claim it did to the cows, it was entirely satisfactory; and with the possible exception of the resultant injuries which I alleged happened to my cows, it did all that I expected of the machine. The operation of any mechanical milking machine cannot cause infectious mammitis.

Thereupon, a stipulation was entered into by and between counsel relative to various depositions which have been taken by the respective parties in the

above-entitled action, which said stipulation was and is as follows, to wit:

The COURT.—State the stipulation.

Mr. PARKE.—It is stipulated that the depositions of Hans J. Hansen, M. S. Autry, James Willis, Edward L. Stam and Gus Harris, all residents of Salt River Valley, near Phoenix, Arizona, show that these various witnesses have milked cows by hand, and thereafter used a Sharples Milking Machine over various periods of time, and upwards of three years, and that they have not had any more trouble with their cattle after the use of the machine than while milking by hand; that they received as much, and in some cases more milk by the use of the machine than when milking [275] by hand; and that, in their opinion, from their observation and use of the machine when properly used, will not cause udder trouble among the cattle upon which a Sharples milking machine is used.

Mr. SWING.—And our part of the stipulation is that witnesses J. H. Eastman, J. W. Finley, H. C. King, J. J. Miller and H. O. Wood, are dairymen of Imperial Valley—

The COURT.—And they testified like this other witness McCullough?

Mr. SWING.—Yes, sir—dairymen of the Imperial Valley and have used the milker in accordance with instructions given them, and they have been unable to operate it, or make it operate without injuring their cows, and it has also resulted in shortage in the milk, all during the year 1914.

Mr. PARKE.—For how long a period in each case?

Mr. SWING.—I mean they used it for a year.

Mr. PARKE.—For a period from two weeks to a year.

Mr. SWING.—All right.

Mr. PARKE.—I agree to the stipulation.

The COURT.—Then it is stipulated that those witnesses will so testify as in their depositions, and the reading of the depositions be waived, and the filing of the depositions will not be necessary.

Mr. PARKE.—The defendant offered in evidence as a part of the cross-examination of Mr. Skinner the bill of particulars furnished to the defendant by Mr. Skinner, and I think the Court said the bill of particulars might be introduced in evidence and marked.

The COURT.—It was marked as an exhibit.

Mr. PARKE.—Yes.

The CLERK.—I think it is Number 2, Defendant's Number 2. [276]

Whereupon, Mr. Parke read to the jury the following paragraphs from plaintiff's bill of particulars:

"7. All four units were in use before any of plaintiff's cows were seriously injured. The four units were used indiscriminately, so that it is impossible for plaintiff to itemize the injury caused by the original three units as distinguished from that caused by the fourth unit purchased by plaintiff after the installation of the machine. No record was kept of

the amount of milk each cow gave.

“19. No information can be given as called for by Demand No. 19, owing to the fact that no record was kept of the effect of the use of the three units purchased from defendant as contradistinguished from the effect of the fourth unit subsequently purchased but will say that approximately twenty of plaintiff's cows were ruined from the use of the four units between the 25th day of June, 1914, and the 7th day of July, 1914. The last half of Demand No. 19 appears to be repetition of Demand No. 17 and the answer thereto has hereinbefore been given.

“23. Herewith is given a list by the month of the pounds of butter fat delivered to Imperial Valley Creamery and Delta Creamery during the year 1914, with the price per pound for butter fat for each month. Plaintiff has not in his possession at the present time a record of butter fat given for the preceding year but knows that the amount delivered by him to the creameries was less in the year 1914 and 1915 than in 1913.

Months	Pounds of Butter Fat.	Price per Pound.
January	1619.77	
February	1493.01	
March	1925.4	22¢
April	1975.3	25¢
May	1834.4	24¢
June	1376.9	26¢
July	1732.	25¢
August	1683.1	25½¢
September	1585.1	27½¢

October	1611.3	31¢
November	1481.8	34½¢
December	1468.9	30¢

[277]

The following is paragraph 13 of the bill of particulars, as furnished by the plaintiff, at defendant's request.

"13. That on or about the 20th day of October, 1914, F. L. Briggs made the representations referred to in the 13th demand. His statements and warranties were both oral and in writing. That a number of his oral statements are substantially set out in paragraph 12 of plaintiff's amended complaint. The number that was not written was as follows:

October 20, 1914.

The Sharples Separator Company do hereby agree to furnish W. W. Skinner one Mechanical Milker Operator for two months more or less, Mr. Skinner to pay him a salary of \$75.00 per month.

It is further understood that Sharples Separator Company are to pay Mr. Skinner for any damage done to his cows by the use of the machine while in the hands of their operator.

It is also understood the Sharples Separator Company are to pay Mr. Skinner the amount of the operator's salary providing the machines are not a success.

SHARPLES SEPARATOR COMPANY,

By F. L. BRIGGS,

W. W. SKINNER."

H. C. KING,

Witness. [278]

Mr. PARKE.—It is further stipulated that Mr. Skinner was recalled to the witness-stand and testified that \$480 was the reasonable market value which he placed upon the pasture of the cows injured and which were later sold as beef cows—from the time of their injury until they were sold.

Mr. SWING.—He testified it was the reasonable value.

Mr. PARKE.—The reasonable value which he placed upon it.

Here the testimony was closed, and the foregoing constituted and was all of the evidence offered and received upon the trial of the above-entitled action, and no other, different or additional evidence or testimony of any character was received by or placed before said Court and jury, in addition to that hereinabove in this bill of exceptions set forth.

Thereupon, counsel for the respective parties argued the cause to the jury; and said argument having been completed, the Court, of its own motion, instructed the jury as follows:

The COURT.—Gentlemen of the jury, it is my duty under the law to state to you what the law is that should guide you in returning a verdict. If I state it wrongfully the parties have an opportunity of appealing to a higher court. It is presumed that I know the law, however violent that presumption may be, but whatever I state to you is the *law you* are bound by it.

It is your duty to determine the facts of the case. That is your trouble, not mine. It is very difficult sometimes to determine what the law is. I have

found it is [279] easier to determine what the facts are than what the law is. But you must take the law as I give it to you and apply it to the evidence that has been introduced and determine the facts. You must decide the case according to the evidence that has been given, and the stipulations of the attorneys must be regarded as evidence, and determine the case solely upon such evidence. The arguments of the counsel in the case is to aid you in determining what the facts are and when you determine what the facts are you must return your verdict accordingly. That is your exclusive privilege, and you must not assume that anything I say intimates to you how you shall decide the facts. I may have my opinions and I might say something that indicates to you what my opinion is but you are not bound by it.

In regard to the witnesses, you are the exclusive judges of whether they testified to the truth and what weight you shall give to what they say. You must determine what they say and what weight you shall give to what they say from their manner upon the witness-stand, their conduct, the reasonableness of their story and the interest they have in the controversy. The fact that the plaintiff is a man, a citizen of our State, and the defendant is a nonresident corporation, should not weigh with you, because in the eyes of the law everybody stands before the Court equal. The law is blind as to parties.

The law gives the parties a right to request the Court to give you certain instructions and if those instructions are the law it is my duty to give those instructions to you. Probably if I had my way about

it I would say to you: "Go off and decide this case," because you know as [280] much about it as I do, but I am required, as I said before, to give you certain instructions.

This is an action brought by plaintiff to recover damages for injuries and losses suffered by him as a result of the operation of a Sharples mechanical milker upon his herd of dairy cows. Plaintiff alleges that defendant sold him a Sharples mechanical milker and warranted the same to be fit and proper for milking plaintiff's dairy cows and represented that if the same was operated according to its instructions it would not injure his cows or decrease the amount of milk received from them. Plaintiff further alleges that said mechanical milker was operated according to the instruction furnished by the Sharples Separator Company, but that it both seriously injured his cows and decreased the amount of milk given by them. These allegations are denied by the defendants and it is for you to decide whether or not they are true. If you find from this evidence that they are true, it is your duty to return a verdict for the plaintiff for such damages as it is shown plaintiff has sustained, as alleged in the complaint, and under the rule of damages which I give you for assessing damages; and I might say here to you, gentlemen, that while Edgar Brothers was sued in this complaint, they are no more a party to this action, because as to them the action has been dismissed.

The evidence in this case shows that plaintiff operated the milker which he purchased from defendant or permitted the same to be operated on all or some

of his cows from about February 7, 1914, to July 7, 1914, and again from October 20th, 1914, to December 20th, 1914. Plaintiff claims that within about a month after the milker was started his cows [281] began suffering from the effects of its operation and that his cows were injured as long as the milker was operated.

If you find from the evidence that the plaintiff's cows were so injured by the operation of said milker you are to allow him damages in a sum which would be a fair compensation for the loss incurred by an effort in good faith to use the machine for milking plaintiff's cows. In considering plaintiff's good faith in continuing the use of the milker and permitting it to be started again after it had once been stopped, you are to consider all the circumstances surrounding the operation of the milker, including the representations made by the defendant company and its employees.

The word "fair" used in this instruction to describe the compensation to which plaintiff may be entitled is not used by me to mean something less than "full" or "complete" compensation; it is used rather in the sense of "just."

The jury are instructed at the time the Sharples Separator Company sold the mechanical milker to plaintiff, the said The Sharples Separator Company guaranteed the machine to be in all respects as represented in its printed matter and to be capable of doing the work claimed therein. Plaintiff has offered in evidence a number of printed documents which he says were delivered to him by the Sharples Sepa-

rator Company during the negotiations leading up to the sale to him of the Sharples mechanical milker. These contained various statements regarding the Sharples mechanical milker, and what it will do, and it is for you to decide from all the evidence whether the warranty has been performed.

You are instructed that the only warranty given to the plaintiff by the defendant Sharples Separator Company [282] which is to be considered by you is the warranty contained in the original order, being Plaintiff's Exhibit 1, introduced in evidence; and you can take that with you to the jury room, gentlemen, or any other exhibit you desire.

You are instructed that, under the law of California, a detriment caused by the breach of a warranty of the quality of personal property is deemed to be the excess, if any, of the value which the property would have had at the time to which the warranty referred, if it had been complied with, over its actual value at that time.

Also that the detriment caused by the breach of warranty of the fitness of an article of personal property for a particular purpose is deemed to be that which I have just specified, together with a fair compensation for the loss incurred by an effort in good faith to use it for such purpose.

The jury are instructed that if you find from the evidence that there was a warranty that the Sharples mechanical milker sold plaintiff would milk his cows without injury and you also find that the warranty was broken, you should allow plaintiff damages for all injuries which are the proximate result of the

operation of said milker upon said cows while the machine was being operated by plaintiff or his help in conformity with instructions furnished by the defendant company, and also damages for all injury done by the milker while being operated by the employee or agent of the defendant company, if you find any time it was so operated by an employee or agent of the defendant company.

If you believe from all the evidence that the milking machine, while being properly operated, was the cause of the injury to plaintiff's cows, then you are instructed that the [283] defendant Sharples Separator Company can be held liable only for the damages resulting from the use of the three units purchased from it, and that the defendant Sharples Separator Company is not liable in damages for the use of the fourth unit purchased by plaintiff through Edgar Brothers.

Plaintiff claims damages in the sum of \$1,007, being the purchase price and cost of installation of the milking machine purchased from the defendant Sharples Separator Company. It appears from the evidence that of said sum of \$1007, only \$461.42 was paid by the plaintiff to the defendant Sharples Separator Company for the milking machine containing the three units, and that the balance of \$1007 was for a gasoline engine, for the lumber to build his stanchions, and for sand and gravel used by the plaintiff in making a cement floor for his milking shed. If your verdict in this case should be for the plaintiff and against the Sharples Separator Company, you are instructed that in arriving at the amount of

damages to be allowed to plaintiff for moneys expended in the purchase and installation of the machine you should deduct from the said sum of \$1007 the reasonable value to the plaintiff of the milking machine, of the gasoline engine so purchased, of the stanchions so built, and of the cement floor so installed by the plaintiff.

If you believe from all the evidence that the diseased condition of the plaintiff's cows was not the result of an infectious disease but of a local injury or traumatic condition, and you believe further from the evidence that any and all permanent injury to said cows so affected could have been prevented by prompt, careful and proper treatment of said cows by the plaintiff, and said plaintiff failed and [284] neglected to give to said cows so diseased such prompt, proper and careful treatment, then you are instructed that the defendant Sharples Separator Company is not liable for damage resulting from such neglect of plaintiff.

If you believe from the evidence that plaintiff's cows had infectious mammitis, or other infectious disease of the udder, and that plaintiff knew of such condition, the plaintiff should not have used said machine upon said cows if he knew that it would spread such disease, and if the defendant, through its agents, desired to use such machine upon said cows, it was the duty of the plaintiff to advise the defendant of such diseased condition, if defendant did not know of it.

The burden is upon the plaintiff to show by a preponderance of the evidence that the injury to his

cows was caused by the use of the milking machine furnished by defendant while the same was being operated in strict accordance with the instructions given plaintiff by the defendant Sharples Separator Company, and if you find that the diseased condition of plaintiff's cows was the result of improper operation of the machine by the plaintiff, or of infections mammitis or other infectious disease not the direct result of said machine and the proper operation thereof, then your verdict must be for the defendant.

If you believe from all the evidence that plaintiff's cows were injured by the use of the milking machine furnished by the defendant while being operated in strict accordance with the instructions given to the plaintiff by the defendant, or while being operated by the defendant upon the plaintiff's cows, then the plaintiff is entitled [285] to recover such damages as are shown by the evidence to have been the proximate result of injuries caused by said machine.

In estimating the value of the cows that were injured the true measure of such damage is the value of said cows before they were injured and the value after such injury resulted. And in speaking of value, gentlemen, I am speaking of the market value of the cows.

You must not allow a duplication of damages. That is to say, you must not allow for the value of the cow and also for the value of the butter fat that she might have given after her loss, and I give you these rules to govern you in allowing the damages:

1st. Where a cow died, you shall allow for the use

of the cow, that is to say, for the loss of the butter fat which the plaintiff sustained by reason of the injury to the cow until the time of her death; then allow for the value of the cow if she had not been injured.

2d. Where a cow was permanently injured and destroyed as a milk cow, you shall allow for the loss of the butter fat from the time she was injured for a reasonable length of time to determine that the cow would be of no further service as a milk cow and until she was well enough to be disposed of for beef; then allow the difference between the value of the cow for beef.

3d. Where a cow was not destroyed as a milk cow but permanently injured, you shall allow for loss of butter fat during the time she was injured so that she gave a less quantity of milk, then consider the amount of damage that was done to the cow, that is to say, the value of the cow [286] before her injury, and the value of the cow as a milk cow after her injury.

4th. Where a cow was not permanently injured, but was only injured for a time, you shall allow for loss of butter fat during the time she was injured and did not give her normal amount of milk.

5th. If the machine did not produce as much milk when being used as if said cows had been milked by hand, and there was in consequence a loss of butter fat, you can take that into consideration and allow for such loss of butter fat.

In determining the loss of the use of the cow that is shown by the loss of butter fat, you should take into consideration the expense of keeping the cow, and not allow expense of pasturage and also loss of use of cows.

In regard to damages, I instruct you that the plaintiff sets out certain damages which plaintiff claims he is entitled to. He cannot recover any different or other damages than that specified in the amended complaint and the amendment thereto. These two papers you can have with you when you consult, if you so desire.

When you retire to your jury-room, gentlemen, to consider your verdict, the first thing you should do is to elect a foreman, and when you shall have determined upon your verdict, let the foreman sign it and return it to court. You shall all agree upon the verdict before you can return one. It is the law in the State of California, that *that* less than twelve jurors may return a verdict, but that is not so in this court, you must all concur in the verdict.

And be it further remembered that the foregoing [287] was and is the whole of the charge of said Court to said jury, and that no other, further, different or additional instructions were given by said Court to said jury.

And be it further remembered that heretofore, and during the trial of said cause, said defendant, Sharples Separator Company, a corporation, through its counsel, duly presented within due and proper time to said court certain instructions asked by said last named defendant to be given to the jury in said cause, and said instructions were received by said court in time; and in as much as the rulings of said court upon said requested instructions, and the exceptions of said defendant corporation thereto form part and portion of the exceptions relied upon

by said defendant herein, said defendant, said Sharples Separator Company, a corporation, here and now sets out said requested instructions, together with the ruling of the court thereon and the exceptions taken thereto, and each and all of said rulings and exceptions were made and taken in the presence of said jury, while the jury was still at the bar of said court, and before said jury retired to deliberate upon its verdict. Said instructions requested by said defendant, Sharples Separator Company, a corporation, together with the ruling of said court thereon, and the said exceptions taken thereto, as hereinabove set forth, were as follows, to wit:

**Instructions Requested by Defendant Sharples
Separator Company, a Corporation.**

DEFENDANT'S REQUEST NO. II.

If you believe from all the evidence that the plaintiff's cows were injured by the use of the milking [288] machine furnished by the defendant Sharples Separator Company, while being operated in strict accordance with the instructions given to the plaintiff by the defendant, then you are instructed that the full measure of plaintiffs' damage is the difference between the value of the cows before they were injured, and the value immediately after such injury resulted, and if such damage be allowed plaintiff is not entitled to recover anything additional for care or keep of said cows, or for loss of butter fat therefrom.

Which said instruction No. II said Court then and there refused to give said jury, and in failing so to

instruct and charge said jury, said Court misdirected said jury; and to said ruling of said Court, refusing to give said instruction to said jury, the said defendant Sharples Separator Company, a Corporation, then and there duly excepted.

EXCEPTION NUMBER 66.

And said defendant, Sharples Separator Company, a corporation, now assigns said ruling as error.

DEFENDANT'S REQUEST NO. III.

You are instructed that the plaintiff is not entitled to any claim for damages for loss of butter fat.

Which said Instruction No. III, said Court then and there refused to give to said jury, and in failing so to instruct and charge the jury, said Court misdirected said jury; and to said ruling of said Court, refusing to give said *instruction said* jury, the said defendant, Sharples Separator Company, a corporation, then and there duly excepted.

EXCEPTION NUMBER 67. [289]

And said defendant, Sharples Separator Company, a corporation, now assigns said ruling as error.

DEFENDANT'S REQUEST NO. IV.

There is no evidence before the Court as to the value of the pasturage claimed by plaintiff, and plaintiff cannot recover therefor.

Which said Instruction No. IV said Court then and there refused to give to said jury, and in failing so to instruct and charge said jury, said Court misdirected said jury; and to said ruling of said Court, refusing to give said instruction to said jury, the said defendant, Sharples Separator Company, a cor-

poration, then and there duly excepted.

EXCEPTION NUMBER 68.

DEFENDANT'S REQUEST NO. VII.

And said defendant, Sharples Separator Company, a corporation, now assigns said ruling as error.

If from all the evidence, you believe that the plaintiff's cows had infectious mammitis, or any other infectious disease of the udder, and that such disease contributed to, or caused any part, or all, of the injury to the cows claimed to have been injured, then you are instructed that the defendant Sharples Separator Company cannot be held liable in damages to the plaintiff for such injury resulting from such diseased condition.

Which said Instruction No. VII, said Court then and there refused to give to said jury, and in failing so to instruct and charge said jury, said Court misdirected said jury; and to said ruling of said Court, refusing to give said instruction to said jury, the said defendant, [290] Sharples Separator Company, a corporation, then and there duly excepted.

EXCEPTION NUMBER 69.

And said defendant, Sharples Separator Company, a corporation, now assigns said ruling as error.

DEFENDANT'S REQUEST NO. IX.

If you believe from all the evidence, that plaintiff's cows had infectious mammitis, or other disease of the udder, and that with knowledge of the diseased condition the plaintiff used, or permitted the milking machine purchased from defendant Sharples Separator Company to be used upon the cows so diseased, you are instructed that the defendant

Sharples Separator Company is not liable for the injury resulting from the use of the machine upon cows so diseased.

Which said Instruction No. IX, said Court then and there refused to give to said jury, and in failing so to instruct and charge said jury, said Court misdirected said jury; and to said ruling of said Court, refusing to give said instruction to said jury, the said defendant, Sharples Separator Company, a corporation, then and there duly excepted.

EXCEPTION NUMBER 70.

And said defendant, Sharples Separator Company, a corporation, now assigns said ruling as error.

DEFENDANT'S REQUEST NO. XI.

If you believe, from all the evidence, that the diseased condition of plaintiff's cows which resulted in the injury complained of by him, was a traumatic, or noninfectious disease of the udder, known as ordinary garget, and that the permanent injury to plaintiff's cows as claimed by him resulted from a lack of proper care and treatment of said [291] cows by the plaintiff, then you are instructed that the defendant Sharples Separator Company cannot be held responsible for an injury or damage which might have been prevented by the proper treatment of the injured cows by the plaintiff.

Which said Instruction No. XI, said Court then and there refused to give to said jury, and in failing so to instruct and charge said jury, said Court misdirected said jury; and in said ruling of said Court, refusing to give said instruction to said jury, the said defendant, Sharples Separator Company,

a corporation then and there duly excepted.

EXCEPTION NUMBER 71.

And said defendant, Sharples Separator Company, a corporation, now assigns said ruling as error.

DEFENDANT'S REQUEST NO. XII.

You are instructed that your verdict in this case should be in favor of the defendant Sharples Separator Company.

Which said Instruction No. XII, said Court then and there refused to give to said jury, and in failing so to instruct and charge said jury, said Court misdirected said jury; and to said ruling of said Court, refusing to give said instruction to said jury, the said defendant, Sharples Separator Company, a corporation, then and there duly excepted.

EXCEPTION NUMBER 72.

And said defendant, Sharples Separator Company, a corporation, now assigns said ruling as error.

[292]

DEFENDANT'S REQUEST NO. XIV.

If you believe, from all the evidence, that any part or all of the damage to plaintiff's cows, from whatever cause, resulted from a lack of prompt, proper, and careful treatment of said cows by the plaintiff, then you are instructed that for all such resulting damage the defendant Sharples Separator Company is not liable.

Which said Instruction No. XIV, said Court then and there refused to give to said jury, and in failing so to instruct and charge said jury, said Court misdirected said jury; and to said ruling of said Court, refusing to give said instruction to said jury, the

said defendant, Sharples Separator Company, a corporation, then and there duly excepted.

EXCEPTION NUMBER 73.

And said defendant, Sharples Separator Company, a corporation, now assigns said ruling as error.

DEFENDANT'S REQUEST NO. XV.

If you believe, from all the evidence, that the death of the three cows, and the diseased condition of the udders of the other twenty-four cows, resulted from the invasion into the udders of these cows of an infectious disease, then the defendant in this case is not liable to the plaintiff for such damages.

Which said Instruction No. XV, said Court then and there refused to give to said jury, and in failing so to instruct and charge said jury, said Court misdirected said jury; and to said ruling of said Court, refusing to give said instruction to said jury, the said defendant, Sharples Separator Company, a corporation, then and there duly excepted.

EXCEPTION NUMBER 74. [293]

And said defendant, Sharples Separator Company, a corporation, now assigns said ruling as error.

DEFENDANT'S REQUEST NO. XVI.

If you believe, from all the evidence, that the diseased condition of plaintiff's cows resulted from the negligent or improper use by him of the milking machine purchased from the defendant, then you are instructed that the defendant Sharples Separator Company is not liable for such damage.

Which said Instruction No. XVI, said Court then and there refused to give to said jury, and in failing so to instruct and charge said jury, said Court

misdirected said jury; and to said ruling of said Court, refusing to give said instruction to said jury, the said defendant, Sharples Separator Company, a corporation, then and there duly excepted.

EXCEPTION NUMBER 75.

And said defendant, Sharples Separator Company, a corporation, now assigns said ruling as error.

And be it further remembered that said defendant, said Sharples Separator Company, a corporation, then and there duly excepted to all that part of the charge of said Court, to said jury which reads as follows, to wit:

This is an action brought by plaintiff to recover damages for injuries and losses suffered by him as a result of the operation of a Sharples mechanical milker upon his herd of dairy cows. Plaintiff alleges that defendant sold him a Sharples mechanical milker and warranted the same to be fit and proper for milking plaintiff's dairy cows and [294] represented that if the same was operated according to its instructions it would not injure his cows or decrease the amount of milk received from them. Plaintiff further alleges that said mechanical milker was operated according to the instruction furnished by the Sharples Separator Company, but that it both seriously injured his cows and decreased the amount of milk given by them. These allegations are denied by the defendants and it is for you to decide whether or not they are true. If you find from this evidence that they are true, it is your duty to return a verdict for the plaintiff for such damages as it is shown plaintiff has sustained, as al-

leged in the complaint, and under the rule of damages which I give you for assessing damages; and I might say here to you, gentlemen, that while Edgar Brothers was sued in this complaint they are *to move* a party to this action, because as to them the action has been dismissed.

EXCEPTION NUMBER 76.

And said defendant, said Sharples Separator Company, a corporation, now assigns as error the giving of said instruction to said jury by said Court.

And be it further remembered that said defendant, said Sharples Separator Company, a corporation, then and there duly excepted to all that part of the charge of said court to said jury which reads as follows, to wit:

The evidence in this case shows that plaintiff operated the milker which he purchased from defendant or permitted the same to be operated on all or some of his cows from about February 7, 1914, to July 7, 1914, and again from October 20th, 1914, to December 20th, 1914. Plaintiff claims that within about a month after the milker was started [295] his cows began suffering from the effects of its operation and that his cows were injured as long as the milker was operated.

If you find from the evidence that the plaintiff's cows were so injured by the operation of said milker you are to allow him damages in a sum which would be a fair compensation for the loss incurred by an effort in good faith to use the machine for milking plaintiff's cows. In considering plaintiff's good faith in continuing the use of the milker and per-

mitting it to be started again after it had once been stopped, you are to consider all the circumstances surrounding the operation of the milker, including the representations made by the defendant company and its employees.

The word "fair" used in this instruction to describe the compensation to which plaintiff may be entitled is not used by me to mean something less than "full" or "complete" compensation; it is used rather in the sense of "just."

EXCEPTION NUMBER 77.

And said defendant, said Sharples Separator Company, a corporation, now assigns as error the giving of said instruction to said jury by said Court.

And be it further remembered that said defendant, said Sharples Separator Company, a corporation, then and there duly executed to all that part of the charge of said Court to said jury which reads as follows, to wit:

The jury are instructed at the time the Sharples Separator Company sold the mechanical milker to plaintiff, the said The Sharples Separator Company guaranteed the machine to be in all respects as represented in its printed [296] matter and to be capable of doing the work claimed therein. Plaintiff has offered in evidence a number of printed documents which he says were delivered to him by the Sharples Separator Company during the negotiations leading up to the sale to him of the Sharples mechanical milker. These contained various statements regarding the Sharpless mechanical milker, and what it will do, and it is for you to decide from

all the evidence whether the warranty has been performed.

EXCEPTION NUMBER 78.

And said defendant, said Sharples Separator Company, a corporation, now assigns as error the giving of said instruction to said jury by said Court.

And be it further remembered that said defendant, said Sharples Separator Company, a corporation, then and there duly excepted to all that part of the charge of said Court to said jury which reads as follows, to wit:

You are instructed that the only warranty given to the plaintiff by the defendant Sharples Separator Company which is to be considered by you is the warranty contained in the original order, being plaintiff's Exhibit 1, introduced in evidence; and you can take that with you to the jury-room, gentlemen, or any other exhibit you desire.

You are instructed that, under the law of California, a detriment caused by the breach of a warranty of the quality of personal property is deemed to be the excess, if any, of the value which the property would have had at the time to which the warranty referred, if it had been complied with, over its actual value at that time.

Also that the detriment caused by the breach of warranty of the fitness of an article of personal property [297] for a particular purpose is deemed to be that which I have just specified, together with a fair compensation for the loss incurred by an effort in good faith to use it for such purpose.

EXCEPTION NUMBER 79.

And said defendant, said Sharples Separator Com-

pany, a corporation, now assigns as error the giving of said instruction to said jury by said Court.

And be it further remembered that said defendant, said Sharples Separator Company, a corporation, then and there duly excepted to all that part of the charge of said Court to said jury which reads as follows, to wit:

The jury are instructed that if you find from the evidence that there was a warranty that the Sharples mechanical milker sold plaintiff would milk his cows without injury and you also find that the warranty was broken, you should allow plaintiff damages for all injuries which are the proximate result of the operation of said milker upon said cows while the machine was being operated by plaintiff or his help in conformity with instructions furnished by the defendant company, and also damages for all injury done by the milker while being operated by the employee or agent of the defendant company, if you find any time it was so operated by an employee or agent of the defendant company.

EXCEPTION NUMBER 80.

And said defendant, said Sharples Separator Company, a corporation, now assigns as error the giving of said instruction to said jury by said Court.

And be it further remembered that said defendant, said Sharples Separator Company, a corporation, then and [298] there duly excepted to all that part of the charge of said court to said jury which reads as follows, to wit:

If you believe from all the evidence that plaintiff's cows were injured by the use of the milking

machine furnished by the defendant, while being operated in strict accordance with the instructions given to the plaintiff by the defendant, or while being operated by the defendant upon the plaintiff's cows, then the plaintiff is entitled to recover such damages as are shown by the evidence to have been the proximate result of injuries caused by said machine.

EXCEPTION NUMBER 81.

And said defendant, said Sharples Separator Company, a corporation, now assigns as error the giving of said instruction to said jury by said Court.

And be it further remembered that said defendant, said Sharples Separator Company, a corporation, then and there duly excepted to all that part of the charge of said Court to said jury which reads as follows, to wit:

In estimating the value of the cows that were injured the true measure of such damage is the value of said cows before they were injured and the value after such injury resulted. And in speaking of value, gentlemen, I am speaking of the market value of the cows.

EXCEPTION NUMBER 82.

And said defendant, said Sharples Separator Company, a corporation, now assigns as error the giving of said instruction to said jury by said court. And be it further remembered that said defendant [299] said Sharples Separator Company, a corporation, then and there duly excepted to all that part of the charge of said Court to said jury which reads as follows, to wit:

You must not allow a duplication of damages. That is to say, you must not allow for the value of the cow and also for the value of the butter fat that she might have given after his loss, and I give you these rules to govern you in allowing the damages:

1st: Where a cow died, you shall allow for the use of the cow, that is to say, for the loss of the butter fat which the plaintiff sustained by reason of the injury to the cow until the time of her death; then allow for the value of the cow if she had not been injured.

2d: Where a cow was permanently injured and destroyed as a milk cow, you shall allow for the loss of the butter fat from the time she was injured for a reasonable length of time to determine that the cow would be of no further service as a milk cow and until she was well enough to be disposed of for beef; then allow the difference between the value of the cow before she was injured and the value of the cow for beef.

3d: Where a cow was not destroyed as a milk cow, but permanently injured, you shall allow for loss of butter fat during the time she was injured so that she gave a less quantity of milk, then consider the amount of damage that was done to the cow, that is to say, the value of the cow before her injury, and the value of the cow as a milk cow after her injury.

4th: Where a cow was not permanently injured, but was only injured for a time, you shall allow for loss of butter [300] fat during the time she was injured and did not give her normal amount of milk.

5th: If the machine did not produce as much milk when being used as if said cow had been milked by hand, and there was in consequence a loss of butter fat, you can take that into consideration and allow for such loss of butter fat.

In determining the loss of the use of the cow that is shown by the loss of butter fat, you should take into consideration the expense of keeping the cow, and not allow expense of pasturage and also loss of use of cows.

EXCEPTION NUMBER 83.

And said defendant, said Sharples Separator Company, a corporation, now assigns as error the giving of said instruction to said jury by said Court.

The COURT.—An exception will be entered to each of the instructions given by the Court, and to each of the instructions requested by the respective parties and refused.

Swear the bailiff.

And be it further remembered that each and all of the foregoing rulings and exceptions made and taken during the progress of said trial, were made and taken in the presence of said jury, while said jury was still at the bar of said Court, and before said jury retired to deliberate upon its verdict; and that after said bailiff had been duly sworn as ordered by said Court, said jury then retired in charge of such sworn officer to consider their verdict, and thereafter came into court and gave, made, rendered and returned the following verdict, to wit: [301]

*In the District Court of the United States, in and
for the Southern District of California, South-
ern Division.*

No. CIVIL 413.

W. W. SKINNER,

Plaintiff,

vs.

SHARPLES SEPARATOR COMPANY,

Defendant.

Verdict.

"We, the jury in the above-entitled cause, find in
favor of the plaintiff in the sum of \$3,763.92.

Los Angeles, California, October 13, 1916.

L. T. BRADFORD,

Foreman."

And to said verdict said defendant, said Sharples
Separator Company, a corporation, then and there
duly excepted.

EXCEPTION NUMBER 84.

And said defendant, said Sharples Separator
pany, a corporation, now assigns said verdict as
error. [302]

**ASSIGNMENT AND SPECIFICATION OF
ERRORS.**

And be it further remembered that the above-
named defendant, said Sharples Separator Com-
pany, a corporation, now assigns and specifies the fol-
lowing errors occurring at the trial of said action,
to wit:

I.

Particulars wherein the evidence is insufficient to justify the verdict.

(a). There is no evidence upon which the jury could find that the milking machine furnished by the defendant caused the injury shown to have been sustained by plaintiff's cows.

(b). The plaintiff failed to introduce any evidence from which the jury might determine the amount of injury or loss, if any, that was sustained by plaintiff, from the use of the three units purchased from the defendant, and the one unit purchased from Edgar Brothers Company.

(c). The preponderance of the evidence shows that the injury actually resulting to plaintiff's cows, and the consequent loss of milk, if any, was due to the invasion of an infectious disease, not produced or caused by the operation of the machine furnished by the defendants.

(d). The preponderance of the evidence shows that the plaintiff's cows were affected with an infectious disease, and that such infectious disease was not and could not have been caused by the operation of the milking machine furnished by the defendant.

(e). The evidence does not show that the plaintiff was damaged in the amount found by the jury.

(f). The preponderance of the evidence shows that a [303] large part of the damage sustained by the plaintiff's cattle resulted from a lack of proper care and treatment thereof by the plaintiff and that had said plaintiff treated said cows in a proper and careful manner, a large part of the in-

jury sustained by said cattle would have been prevented.

(g). The preponderance of the evidence shows that the defendant committed no breach of warranty, and that whatever damage was suffered by the plaintiff was the result of other causes than the operation of the milking machine furnished by the defendant.

II.

Particulars in which said verdict is contrary to and against the law and the evidence.

(a). The verdict is contrary to and against the law and the evidence in that the preponderance of the evidence shows that the damage sustained by plaintiff's cattle resulted from the invasion into the udders of said cattle of an infectious disease, not caused by the operation of the milking machine furnished by defendant, and the jury were instructed by the Court that the defendant was not liable for such damage resulting from such infectious disease.

(b). The amount of damages awarded the plaintiff by the jury is excessive, and finds no support in the evidence, and is contrary to the instructions of the Court, in that the jury in arriving at the amount of damages stated in its verdict awarded plaintiff damage not only for the injury sustained by his cattle, but also for loss of milk; and also allowed plaintiff for the injury, if any, which resulted to his cattle from the use and operation of the fourth unit purchased by him from Edgar Brothers. [304]

III.

Particulars in which said verdict is contrary to and against the charge of the Court.

(a). The verdict of the jury is contrary to the

charge of the Court, in that the jury awarded the plaintiff damages which resulted from the use and operation of the fourth unit of the milking machine which was purchased from Edgar Brothers, in violation of the instructions of the Court that the defendant was not liable for such damage.

(b). The verdict of the jury is contrary to the charge of the Court, in that in arriving at the verdict the jury duplicated damages in allowing to the plaintiff full value for all cows claimed by him to have been injured, and also allowing to the plaintiff a sum of money for loss of butter fat, and for pasturage of his cattle after the alleged injury occurred, and in so doing the jury disregarded the instructions of the Court that it should not, in arriving at its verdict, duplicate damages.

(c). The verdict of the jury is contrary to and against the charge of the Court, in that the evidence shows that the damage resulting to plaintiff's cattle, and the consequent loss of butter fat or milk, if any, was the result of the invasion into the udders of plaintiff's cattle of an infectious disease, and under the instruction of the Court the plaintiff was not entitled to recover anything for damages resulting from said cause.

(d). The verdict of the jury is contrary to and against the charge of the Court, in that the evidence shows that a large part, or all of the damages sustained by plaintiff's cattle, could have been prevented had the plaintiff given to said cattle prompt and careful treatment, and under the instructions given by the Court the defendant could not be held

[305] liable for damage which might have thus been prevented by prompt and careful treatment of the cattle by the plaintiff.

IV.

Particulars of the errors in law occurring during the trial, and excepted to by said defendant, Sharples Separator Company, a corporation, as follows:

(a). The Court erred in denying defendant's motion, as set forth in defendant's bill of exceptions, Exception No. 5, which said motion was to strike out the following testimony:

"The WITNESS.—I can't well state what we did without I tell you what passed between us. Briggs, he wanted to start the machine again, and I would not agree to it.

Mr. PARKE.—We move to strike that out, as to what Briggs wanted to do."

Said motion to strike out was then and there denied by the Court, to which ruling said defendant, Sharpless Separator Company, a corporation, then and there duly excepted, and now assigns said ruling as error.

(b). The Court erred in overruling defendant's objection to the following testimony as set forth in defendant's bill of exceptions, Exception No. 6 as follows:

"The WITNESS.—I finally agreed that if they would take charge of the machine on thirty cows—

Mr. PARKE.—If the Court please, we object to any agreements entered into be and between

Skinner and Mr. Briggs, or anything in the nature of a warranty; this machine was sold on a written warranty. Briggs had no authority to contract.”

Said objection was then and there overruled by the Court, to which ruling said defendant, Sharpless Separator Company, [306] then and there duly excepted, and now assigns said ruling as error.

“The WITNESS.—Briggs wanted to start the machine. I told him I would not let him do it. That was first. He then came back again. He and I went to Mr. Edgar Bros. and we came to an agreement. *An* we came to an agreement. That is the writing I entered into. My signature is at the bottom there. That is my signature. This H. S. King is Mr. Edgar Bros. man—I desired a witness. But for my receiving this written paper I would not have allowed Reed to re-start the machine.

(c). The Court erred in permitting the plaintiff to amend his complaint as set forth in defendant’s Bill of Exceptions, Exception No. 7 as follows:

“The COURT.—You may amend your complaint, if you wish to. The objection is overruled.

Mr. PARKE.—Note an exception.”

To which ruling said defendant, said Sharpless Separator Company, then and there duly excepted, and now assigns said ruling as error.

(d). The Court erred in denying defendant’s motion to strike out testimony as set forth in defend-

ant's Bill of Exceptions, Exception No. 9, which said motion is as follows:

“Mr. PARKE.—The Sharples Separator Company, a corporation, moves to strike out all of the testimony of the witness on the value of the milk, as stating a mere conclusion.”

Said motion was then and there denied by the Court, to which ruling said defendant, Sharpless Separator Company, a corporation, then and there duly excepted, and now assigns said ruling as error.

(e). The Court erred in overruling defendant's objection to the testimony as set forth in defendant's Bill of Exceptions, Exception No. 11, as follows:

“The COURT.—Q. Did you consent to its being used on your cows by reason of what Briggs induced you to do?

Mr. PARKE.—I dislike to object to the Court's questions but we object to the question as to the conditions under which he started the use of the machine.” [307]

Said objection was then and there overruled by the Court, to which ruling said defendant, said Sharpless Separator Company, then and there duly excepted, and now assigns said ruling as error.

“The WITNESS.—Yes, sir. In October the machine was used practically two months, and a man by the name of Reed operated it. I did not employ Reed. Mr. Reed came and took charge of the machine on a string of cows. Mr. Reed and Mr. Briggs were there when the machine started, and they selected their cows that had not been injured, young cows, and then se-

lected a herd that they thought the machine would milk. I don't know that they thought that. At least, they picked such cows as they wanted. I had nothing to do with it. I told them to pick the herd and get just such cows as they wanted. I had nothing to do with selecting the cows. The machine had gotten dirty. They took those things and boiled them, and put in new rubbers, and started them up on those thirty cows. Mr. Reed had absolute control of it. I had nothing to do with it at all. It had not been there but just a little bit, and a cow came into the corral with one of these bad quarters. I had cows that had not been milked with the milker in that herd. There were two strings. Some of those cows had had a milker on them in June and July. I had cows that this milker was not put on at any time. It is a hard question to answer, how many, I had some young cows. No cows got diseased that were not milked with the milker. Up to July they milked all the cows with the milker. I had some cows that came in after that that were not milked with the milker, but they selected some of those cows that had come in, young cows, and put the machine on them in October and November. After October [308] seven of the cows were hurt and some of them injured. I only claim those absolutely ruined for dairy purposes. Some of them were injured that I put in no claim for. And as to the value of those cows what I say were ruined, I would have to get my

instructions out again to segregate those different cows.”

(f). The Court erred in overruling defendant’s objection to the testimony as set forth in defendant’s Bill of Exceptions, Exception No. 12, as follows:

“Mr. SWING.—Q. With reference to the guarantee which he gave you, or purported to give you at the time he consented to restarting the milker, I will ask you if at any time since you have ever received any notice or intimation from the company that that was not a valid contract or guarantee?

Mr. PARKE.—We object to the question—that a guarantee was given by Briggs; and if that alleged contract was not binding upon the company, it would not make any difference whether they ever repudiated it or not, if there was no consideration therefor.”

Said objection was then and there overruled by said Court, to which ruling of the Court the defendant, said Sharples Separator Company, a corporation, then and there duly excepted, and now assigns said ruling as error.

“The WITNESS.—They did not notify me.”

(g). The Court erred in overruling defendant’s objection to the testimony set forth in defendant’s Bill of Exceptions, Exception No. 13, as follows:

“The COURT.—Did they ever notify you that Briggs was not their agent and had no authority to do what he did do? [309]

Mr. PARKE.—We object to the question upon all of the grounds heretofore stated.”

Said objection was then and there overruled by the Court, to which ruling said defendant, said Sharpless Separator Company, then and there duly excepted, and now assigns said ruling as error.

“The WITNESS.—No. sir.”

(h). The Court erred in overruling defendant's objection to the testimony set forth in defendant's bill of exceptions, exception No. 14—A, as follows:

“Mr. SWING.—Q. At the time Albert J. Reed, quit, if he did, on December 20th, state what, if anything, he said at the time he quit?

A. When Mr. Reed quit?

Q. Yes.

Mr. PARKS.—We object to that as incompetent, irrelevant and immaterial, and there is no evidence before the Court of any kind, nature or description, that Reed was the agent of the Sharpless Separator Company.”

Said objection was then and there overruled by the Court, to which ruling said defendant, said Sharpless Separator Company, then and there duly excepted, and now assigns said ruling as error.

“The WITNESS.—The first intimation that I had that Mr. Reed was going to quit, I walked into the corral, and there was one of the cows showed she was not feeling good, and I was in a hurry and was going to the ranch, and I said, ‘Mr. Reed, is that cow sick’? He said, ‘Look at her back.’ And I just stopped, and it was a heifer, and the back was all swollen up. And I didn’t say a word, and Mr. Reed didn’t, for a half a minute, and then Mr. Reed said, ‘Skinner, I am

[310] going to quit. I have ruined the last cow with this machine that I expect to ruin.' He quit, and I took him to town, and after he got to town, the first thing he did, he went in and talked to Mr. Edgar. He made, in my presence, a statement to Mr. Edgar regarding his ability or inability to run the machine.

Mr. SWING.—What did he say?

Mr. PARKE.—We object to that as incompetent, irrelevant and immaterial, any statements made by Mr. Reed, there being no evidence that he was an agent or employee at this time of the Sharpless Separator Company.

The COURT.—I will sustain the objection.

(i). The Court erred in overruling defendant's objection to the testimony set forth in defendant's bill of exceptions, exception No. 15 as follows:

"The WITNESS.—(Continuing.) Reed quit. After he went in town he sent Mr. Frank a telegram. I saw the telegram written. It was written by Mr. Reed.

Q. Do you know his handwriting, or are you able to identify that? (Handing a paper to the witness.)

A. It is very much like it; I believe it is.

Mr. SWING.—We offer now in evidence the copy written by Reed, which is attached to this deposition, which Reed testified is his handwriting, and which he wrote, and also the original furnished by the company, which is word for word like this. I offer the two.

Mr. PARKE.—We object to that as incompe-

tent, irrelevant and immaterial, and further that no evidence is before the Court that Reed was an agent for the Sharpless Separator Company, or any other employee at this time.” [311]

Said objection was then and there overruled by said Court, to which said ruling said defendant, Sharpless Separator Company, then and there duly excepted, and now assigns the same as error.

“Mr. SWING.—I will read this to the jury:

‘El Centro, California, December 18, 1914. Sharpless Separator Company, 420 Mission Street, San Francisco. Have done everything possible. Serious trouble started again. Taking too big a risk to continue use of machine. We have discussed every possible phase of situation, but quit milking. Safest way, or we will have too big a loss according to our agreement. Will await instructions here. Wire at once. Albert J. Reed.’ ”

(j). The Court erred in overruling defendant’s objection to the testimony set forth in defendant’s bill of exceptions, exception to No. 16, as follows:

“Mr. SWING.—Was it started before or after that written paper was signed by Mr. Briggs?

Mr. PARKE.—We object to that. There is no evidence of a written contract of any kind.

The COURT.—Objection overruled.

Mr. PARKE.—Note an exception.”

Said defendant, said Sharpless Separator Company, a corporation, now assigns said ruling as error.

“The WITNESS.—After. Briggs was there for one milking, after Reed came, and then a

time or two after. Briggs helped Reed to sterilize everything and get it milking. Reed operated it from October until just after Christmas, and while the machine was being operated something like seven or eight cases, I think, of swollen quarters [312] developed. During that time no new cases of swollen quarters developed among the two strings that were being milked by him. As to what cows Briggs and Reed put the milker on when they started on October 20th, they selected a string of good cows. I think they were mostly young cows that had not been used on the milking machine before. Some of the cows had had their first calves. I don't know how many. As to what was the occasion of Reed's quitting on December 20th, why, when he came into the kitchen—he always came into the kitchen where I was—when he came in, he said he wasn't going to put the milker on another cow; and I wanted to know why, and the words that he used was that he had ruined the last cow for us with a milking machine that he was going to."

(k) The Court erred in denying defendant's motion as set forth in defendant's bill of exceptions, Exception No. 18 as follows:

"Thereupon the defendant, Sharpless Separator Company, made the following motion:

"We desire to move for a nonsuit, on the ground that it appears from the evidence that the damage, if any, suffered, even under the testimony of the plaintiff, was for the indis-

criminate use of the four units, and it further appearing from the evidence that one unit was purchased from Edgar Brothers, and three from the Sharpless Separator Company, and no evidence having been introduced, and no basis given upon which the jury or the Court could arrive at the damage, if any, which ensued from the three units purchased from the defendant, Sharpless Separator Company, or the damage which resulted from the unit purchased by the plaintiff from Edgar Brothers Company. Upon the further ground that the testimony as offered by the plaintiff is not sufficient [313] to support a verdict in his favor, there being no showing that the milking machine caused any damage to the cows.'

The COURT.—I will overrule your motion.

Exception granted."

And said defendant, said Sharpless Separator Company, a corporation now assigns said ruling as error.

(1). The Court erred in sustaining the plaintiff's objection to defendant's testimony, as set forth in defendant's bill of exceptions, exception No. 19, as follows:

"The WITNESS.—I have seen a Sharpless milking machine, and have seen them in operation. I have examined the udders of cows upon which the Sharpless milking machine was being used. The last place I examined was at Westchester, at a dairy that is run at the experimental farm of the Sharpless Separator Com-

pany. I was in Philadelphia this summer and went down there. I am not in the employ of the Sharpless Separator Company. I simply went there to observe it.

Q. State what you have observed in the condition of the udders of those cows.

Mr. SWING.—We object to the question on the ground that the evidence as to how other machines worked is not admissible to show compliance with the warranty; and we object to the question on the ground as incompetent, irrelevant and immaterial, how some other machine worked, and on the additional ground that no foundation has been laid.

The COURT.—I will sustain the objection as to the cows at Westchester, Pennsylvania.

Mr. PARKE.—Note an exception.”

And said defendant, said Sharples Separator Company, a corporation, now assigns said ruling as error. [314]

(m). The Court erred in sustaining plaintiff's objection to the defendant's testimony, as set forth in defendant's bill of exceptions, exception No. 20, as follows:

“Q. State whether or not during the year 1914, milk or any other dairy products from the Imperial Valley were permitted in the city of Los Angeles to be shipped here for consumption in Los Angeles City.

Mr. SWING.—Objected to as incompetent, irrelevant and immaterial.”

Said objection was then and there sustained by

said Court, to which ruling the defendant said Sharpless Separator Company, then and there duly excepted, and now assigns said ruling as error.

(n). The Court erred in sustaining plaintiff's objection to defendant's testimony as set forth in defendant's bill of exceptions, exception No. 22, as follows:

"The COURT.—Now, if you operate this machine as directed in this book, is it a successful machine? A. Yes.

Q. Would it hurt the cow's bag? A. No.

Mr. PARKS.—Now, just explain on what you base your answer to the question asked by the court.

A. When the machines were installed in our herd, we had a book of instructions, and we followed it.

The COURT.—I don't care anything about your herd.

A. Well, those are the instructions.

M. PARKE.—Well, if the Court please, I insist that the witness has a right to give the reasons upon which he bases his answer, whether or not the machine is a success. He says it [315] is a success, and he has a right to give the reasons upon which he bases that opinion.

Mr. SWING.—Our objections to the offer as it now stands are that it does not include any offer to show that the conditions under which this machine was operated were similar or identical with those under which the machine of the plaintiff was operated.

The COURT.—Objection sustained.

Mr. PARKE.—Note an exception.”

And said defendant, said Sharpless Separator Company, a corporation, now assigns said ruling as error.

(o). The Court erred in sustaining plaintiff’s objection to defendant’s testimony as set forth in defendant’s bill of exception, exception No. 23, as follows:

“Q. State whether or not you got as much milk from a dairy herd of two hundred cows at the Shore Acres dairy as you did from hand milking.

Mr. SWING.—We object to that; it is incompetent, irrelevant and immaterial.

The COURT.—Objection sustained.

Mr. PARKE.—Note an exception.”

And said defendant, said Sharpless Separator Company, a corporation, now assigns said ruling as error.

(p). The Court erred in overruling defendant’s objection to the plaintiff’s testimony as set forth in defendant’s bill of exception, exception No. 26, as follows:

“Mr. SWING.—For whom did you install—for whom were you working when you installed the mechanical milker?

Mr. PARKE.—We object to that question on the ground it [316] is not proper cross-examination, and was not called for in the direct examination.

The COURT.—Objection overruled.

Mr. PARKE.—Note an exception.”

And said defendant, said Sharpless Separator Company, a corporation, now assigns said ruling as error.

“A. I was working for the Sharpless Separator Company.”

The Court erred in overruling defendant's objections to the testimony of Albert J. Reed with regard to his employment with the Sharpless Separator Company, and the testimony of said witness as to his visits to the ranch of W. W. Skinner, and what he did in the way of operating the machine on the ranch of said W. W. Skinner, and the testimony of said witness as to the effect of the operation of said mechanical milker, and the physical condition of the cows of the plaintiff; all of which testimony was duly objected to by the defendant as not being proper cross-examination, as more particularly set forth in defendant's bill of exceptions, and covered by exceptions numbered 27 to 55, inclusive; and said defendant, said Sharpless Separator Company, a corporation, now assigns said rulings as errors.

(q). The Court erred in overruling defendant's objection to plaintiff's testimony, as set forth in defendant's bill of exceptions, Exception No. 58, as follows:

“Q. Is it not a fact, Mr. Nye, that dairy conditions in the Imperial Valley during the year 1914, or during the time when you were State dairy inspector down there, were such that milk and dairy products were not permitted to be

shipped from Imperial Valley into Los Angeles city for consumption?

Mr. SWING.—Objected to as incompetent, irrelevant and immaterial, and not proper cross-examination. [317]

The COURT.—Objection sustained.

Mr. PARKE.—Note an exception.”

The said defendant, said Sharpless Separator Company, a corporation, assigns said ruling as error.

(r). The Court erred in overruling defendant's objection to plaintiff's testimony as set forth in defendant's bill of exceptions, exception No. 60, as follows:

“Q. Doctor, assuming that a herd of dairy cows were being milked, one string by a Sharpless mechanical milker, and another string by hand, and that the only cases of swollen quarters to appear in the herd appeared among the cows milked by the mechanical milker, and that when the condition so appeared the affected cows were taken off the milker and milked together with other cows, then being milked by hand, not being isolated, and that the milkers did not wash their hands between cows, that the cows milked by hand got well, and the swollen quarters did not spread to a single other cow being milked by hand: What would you say as to what was the cause of the swollen quarters?

Mr. PARKE.—We object to the question as assuming only a partial statement of the uncontradicted facts as presented by the evidence, it appearing clearly from the evidence that there

was present in the milk from Skinner's cows certain germs designated as staphylococci, and it be unfair to ask the witness the cause of such condition, without setting forth that condition. And further, nothing is said about the manner in which the milking machine was operated.

The COURT.—Well, I overrule the objection.

Mr. PARKE.—Note an exception.” [318]

And said defendant, said Sharpless Separator Company, a corporation, now assigns, said ruling as error.

(s). The Court erred in overruling defendant's objection to plaintiff's testimony, as set forth in defendant's bill of exceptions, exception No. 64 as follows:

“Q. I will ask you whether, in your opinion, the Sharpless mechanical milker can be operated upon dairy cows in the Imperial Valley without seriously injuring some of them?

Mr. PARKE.—We object to the question as calling for an expert opinion of the witness, no foundation having been laid, incompetent, irrelevant and immaterial, and presuming a state of facts not proven in this case at issue.

The COURT.—The objection is overruled.

Mr. PARKE.—We note an exception.”

And said defendant, said Sharpless Separator Company, now assigns said ruling as error.

“A. No, it cannot.”

(t). The Court erred in overruling defendant's objection to plaintiff's testimony, as set forth in de-

fendant's bill of exceptions, Exception No. 65, as follows:

"Q. What in your opinion, would be the effect upon the string of dairy cows if milked any considerable length of time with a Sharples mechanical milker, even though all the instructions furnished by the company were strictly followed?

Mr. PARKE.—We object to the question as calling for an expert opinion of the witness, presuming a state of facts not proven in this case, and incompetent, irrelevant and immaterial.

[319]

The COURT.—The objection is overruled.

Mr. PARKE.—We note an exception."

And said defendant, said Sharpless Separator Company, a corporation, now assigns said ruling as error.

"A. It would eventually kill the cows if persisted in. It would develop an inflammation, and the inflammation would only be increased and aggravated by the use of the machine, if persisted in." [320]

U. The Court erred in refusing to give to the jury the Instruction No. II as requested by the defendant and as set forth in defendant's bill of exceptions, Exception No. 66, as follows:

"If you believe from all the evidence that the plaintiff's cows were injured by the use of the milking machine furnished by the defendant, Sharples Separator Company while being operated in strict accordance with the instructions

given to the plaintiff by the defendant, then you are instructed that the full measure of plaintiff's damage is the difference between the value of the cows before they were injured, and the value immediately after such injury resulted, and if such damage be allowed plaintiff is not entitled to recover anything additional for care or keep of said cows, or for loss of butter fat therefrom."

Which said Instruction No. II said Court then and there refused to give to said jury, and in failing so to instruct and charge said jury, said Court misdirected said jury; and to said ruling of said Court, refusing to give said instructions to said jury, the said defendant, Sharples Separator Company, a corporation, then and there duly excepted.

V. The Court erred in refusing to give to the jury instruction No. III as requested by defendant and as set forth in defendant's bill of exceptions, Exception 67, as follows:

"You are instructed that the plaintiff is not entitled to any claim for damages for loss of butter fat."

Which said instruction No. III, said Court then and there refused to give to said jury, and in failing so to instruct and charge said jury, said Court misdirected said jury; and to said ruling of said Court, refusing to give said instruction said jury, the said defendant, Sharples Separator Company, a corporation, then and there duly excepted.

W. The Court erred in refusing to give to the jury Instruction No. IV as requested by defendant and

as set [321] forth in defendant's bill of exceptions, Exception No. 68, as follows:

"There is no evidence before the Court as to the value of the pasturage claimed by plaintiff, and plaintiff cannot recover therefor."

Which said Instruction No. IV said Court then and there refused to give to said jury, and in failing so to instruct and charge said jury, said Court misdirected said jury; and to said ruling of said Court, refusing to give said instruction to said jury, the said defendant, Sharples Separator Company, a corporation, then and there duly excepted.

X. The Court erred in refusing to give to the jury Instruction No. VII as requested by defendant and as set forth in defendant's bill of exceptions, Exception No. 69, as follows:

"If, from all the evidence, you believe that the plaintiff's cows had infectious mammitis, or any other infectious disease of the udder, and that such disease contributed to, or caused any part or all, of the injury to the cows claimed to have been injured, then you are instructed that the defendant Sharples Separator Company cannot be held liable in damages to the plaintiff for such injury resulting from such diseased condition."

Which said Instruction No. VII, said Court then and there refused to give to said jury, and in failing so to instruct and charge said jury, said Court misdirected said jury; and to said ruling of said Court, refusing to give said instruction to said jury, the said defendant, Sharples Separator Company, a corpora-

tion, then and there duly excepted.

Y. The Court erred in refusing to give to the jury Instruction No. IX as requested by defendant and as set forth in defendant's bill of exceptions, Exception No. 70, as follows:

"If you believe, from all the evidence, that plaintiff's cows had infectious mammitis, or [322] other disease of the udder, and that with knowledge of the diseased condition the plaintiff used, or permitted the milking machine purchased from defendant Sharples Separator Company to be used upon the cows so diseased, you are instructed that the defendant Sharples Separator Company is not liable for the injury resulting from the use of the machine upon cows so diseased."

Which said Instruction No. IX, said Court then and there refused to give to said jury, and in failing so to instruct and charge said jury, said Court misdirected said jury; and to said ruling of said Court, refusing to give said instruction to said jury, the said defendant, Sharples Separator Company, a corporation, then and there duly excepted.

Z. The Court erred in refusing to give to the jury Instruction No. XI as requested by defendant and as set forth in defendant's bill of exceptions, Exception No. 71, as follows:

"If you believe, from all the evidence, that the diseased condition of plaintiff's cows which resulted in the injury complained of by him, was a traumatic, or noninfectious disease of the udder, known as ordinary garget, and that the perma-

nent injury to plaintiff's cows as claimed by him resulted from a lack of proper care and treatment of said cows by the plaintiff, then you are instructed that the defendant Sharples Separator Company cannot be held responsible for any injury or damage which might have been prevented by the proper treatment of the injured cows by the plaintiff."

Which said Instruction No. XI said Court then and there refused to give to said jury, and in failing so to instruct and charge said jury, said Court misdirected said jury; and in said ruling of said Court, refusing to give said instruction to said jury, the said defendant, Sharples Separator Company, a corporation, then and there duly excepted.

AA. The Court erred in refusing to give the jury Instruction No. XII as requested by defendant and as set [323] forth in defendant's bill of exceptions, Exception No. 72, as follows:

"You are instructed that your verdict in this case should be in favor of the defendant Sharples Separator Company."

Which said Instruction No. XII, said Court then and there refused to give to said jury, and in failing so to instruct and charge said jury, said Court misdirected said jury; and to said ruling of said Court, refusing to give said instruction to said jury, the said defendant, Sharples Separator Company, a corporation, then and there duly excepted.

BB. The Court erred in refusing to give to the jury Instruction No. XIV as requested by defendant

and as set forth in defendant's bill of exceptions, Exception No. 73, as follows:

"If you believe, from all the evidence, that any part or all of the damage to plaintiff's cows, from whatever cause, resulted from a lack of prompt, proper, and careful treatment of said cows by the plaintiff, then you are instructed that for all such resulting damage the defendant Sharples Separator Company is not liable."

Which said Instruction No. XIV, said Court then and there refused to give to said jury, and in failing so to instruct and charge said jury, said Court misdirected said jury; and to said ruling of said Court, refusing to give said instruction to said jury, the said defendant, Sharples Separator Company, a corporation, then and there duly excepted.

CC. The Court erred in refusing to give to the jury Instruction No. XV, as requested by defendant and as set forth in defendant's bill of exceptions, Exception No. 74, as follows:

"If you believe, from all the evidence, that the death of the three cows, and the diseased condition of the udders of the other twenty-four cows, resulted from the invasion into the udders of these cows of an infectious disease, then the [324] defendant in this case is not liable to the plaintiff for such damage."

Which said Instruction No. XV, said Court then and there refused to give to said jury, and in failing so to instruct and charge said jury, said Court misdirected said jury; and to said ruling of said Court, refusing to give said instruction to said jury, the said

defendant, Sharples Separator Company, a corporation, then and there duly excepted.

DD. The Court erred in refusing to give to the jury Instruction No. XVI as requested by defendant and as set forth in defendant's bill of exceptions, Exception No. 75, as follows:

"If you believe, from all the evidence, that the diseased condition of plaintiff's cows resulted from the negligence or improper use by him of the milking machine purchased from the defendant, then you are instructed that the defendant Sharples Separator Company is not liable for such damage."

Which said Instruction No. XVI, said Court then and there refused to give to said jury, and in failing so to instruct and charge said jury, said Court misdirected said jury; and to said ruling of said Court, refusing to give said instruction to said jury, the said defendant, Sharples Separator Company, a corporation, then and there duly excepted.

EE. The Court erred in giving the following instruction to the jury as set forth in defendant's bill of exceptions, Exception No. 76, as follows:

"This is an action brought by plaintiff to recover damages for injuries and losses suffered by him as a result of the operation of a Sharples mechanical milker upon his herd of dairy cows. Plaintiff alleges that defendant sold him a Sharples mechanical milker and warranted the same to be fit and proper for milking plaintiff's dairy cows and represented that if the same was operated according to its instructions it would

not injure his cows or decrease the amount of milk received from them. Plaintiff further alleges that said mechanical milker was operated according to the [325] instruction furnished by the Sharples Separator Company, but that it both seriously injured his cows and decreased the amount of milk given by them. These allegations are denied by the defendants and it is for you to decide whether or not they are true. If you find from this evidence that they are true, it is your duty to return a verdict for the plaintiff for such damages as it is shown plaintiff has sustained, as alleged in the complaint, and under the rule of damages which I give you for assessing damages; and I might say here to you, gentlemen, that while Edgar Brothers was sued in this complaint they are *to move* a party to this action, because as to them the action was dismissed."

And said defendant, said Sharples Separator Company, a corporation, now assigns as error the giving of said instruction to said jury by said Court.

FF. The Court erred in giving the following instruction to the jury as set forth in defendant's bill of exceptions, Exception No. 77, as follows:

"The evidence in this case shows that plaintiff operated the milker which he purchased from defendant or permitted the same to be operated on all or some of his cows from about February 7, 1914, to July 7, 1914, and again from October 20th, 1914, to December 20th, 1914. Plaintiff claims that within about a month after the

milker was started his cows began suffering from the effects of its operation and that his cows were injured as long as the milker was operated."

"If you find from the evidence that the plaintiff's cows were so injured by the operation of said milker you are to allow his damages in the sum which would be a fair compensation for the loss incurred by an effort in good faith to use the machine for milking plaintiff's cows. In considering plaintiff's good faith in continuing the use of the milker and permitting it to be started again after it had once been stopped, you are to consider all the circumstances surrounding the operation of the milker, including the representations made by the defendant company and its employees.

"The word 'fair' used in this instruction to describe the compensation to which plaintiff may be entitled is not used by me to mean something less than 'full' or 'complete' compensation; it is used rather in the sense of 'just.' "

And said defendant, said Sharples Separator Company, a corporation, now assigns as error the giving of said instruction to said jury by said Court. [326].

GG. The Court erred in giving the following instruction to the jury as set forth in defendant's bill of exceptions, Exception No. 78, as follows:

"The jury are instructed at the time the Sharples Separator Company sold the mechanical milker to plaintiff, the said the Sharpless Separator Company guaranteed the machine to

be in all respects as represented in its printed matter and to be capable of doing the work claimed therein. Plaintiff has offered in evidence a number of printed documents which he says were delivered to him by the Sharples Separator Company during the negotiations leading up to the sale to him of the Sharples mechanical milker. These contained various statements regarding the Sharples Mechanical milker, and what it will do, and it is for you to decide from all the evidence whether the warranty has been performed."

And said defendant, said Sharples Separator Company, a corporation, now assigns as error the giving of said instruction to said jury by said Court.

HH. The Court erred in giving the following instruction to the jury as set forth in defendant's bill of exceptions, Exception No. 79, as follows:

"You are instructed that the only warranty given to the plaintiff by the defendant Sharples Separator Company which is to be considered by you is the warranty contained in the original order, being Plaintiff's Exhibit 1, introduced in evidence; and you can take that with you to the jury-room, gentlemen, or any other exhibit you desire.

"You are instructed that, under the law of California, a detriment caused by the breach of a warranty of the quality of personal property is deemed to be the excess, if any, of the value which the property would have had at the time to which the warranty referred, if it had been

complied with, over its actual value at that time.

“Also that the detriment caused by the breach of warranty of the fitness of an article of personal property for a particular purpose is deemed to be that which I have specified, together with a fair compensation for the loss incurred by an effort in good faith to use it for such purpose.”

And said defendant, said Sharples Separator Company, a corporation, now assigns as error the giving of [327] said instruction to said jury by said Court.

II. The Court erred in giving the following instruction to the jury as set forth in defendant's bill of exceptions, Exception No. 80, as follows:

“The jury are instructed that if you find from the evidence that there was a warranty that the Sharples mechanical milker sold plaintiff would milk his cows without injury and you also find that the warranty was broken, you should allow plaintiff damages for all injuries which are the approximate result of the operation of said milker upon said cows while the machine was being operated by plaintiff or his help in conformity with instructions furnished by the defendant company, and also damages for all injury done by the milker while being operated by the employee or agent of the defendant company, if you find any time it was so operated by an employee or agent of the defendant company.”

And said defendant, said Sharples Separator Company, a corporation, now assigns as error the giving

of said instruction to said jury by said Court.

JJ. The Court erred in giving the following instruction to the jury as set forth in defendant's bill of exceptions, Exception No. 81, as follows:

"If you believe from all the evidence that plaintiff's cows were injured by the use of the milking machine furnished by the defendant, while being operated in strict accordance with the instructions given to the plaintiff by the defendant, or while being operated by the defendant upon the plaintiff's cows, then the plaintiff is entitled to recover such damages as are shown by the evidence to have been the proximate result of injuries caused by said machine."

And said defendant, said Sharples Separator Company, a corporation, now assigns as error the giving of said instruction to said jury by said Court.

KK. The Court erred in giving the following instruction to the jury as set forth in defendant's bill of exceptions, Exception No. 82, as follows:

"In estimating the value of the cows that were injured the true measure of such damage [328] is the value of said cows before they were injured and the value after such injury resulted. And in speaking of value, gentlemen, I am speaking of the market value of the cows."

And said defendant, said Sharples Separatory Company, a corporation, now assigns as error the giving of said instruction to said jury by said Court.

LL. The Court erred in giving the following instruction to the jury as set forth in defendant's bill of exceptions, Exception No. 83, as follows:

“You must not allow a duplication of damages. That is to say, you must not allow for the value of the cow and also for the value of the butter fat that she might have given after his loss, and I give you these rules to govern you in allowing the damages:

“1st. Where a cow died, you shall allow for the use of the cow, that is to say, for the loss of the butter fat which the plaintiff sustained by reason of the injury to the cow until the time of her death; then allow for the value of the cow if she had not been injured.

“2d. Where a cow was permanently injured and destroyed as a milk cow, you shall allow for the loss of the butter fat from the time she was injured for a reasonable length of time to determine that the cow would be of no further service as a milk cow until she was well enough to be disposed of for beef; then allow the difference between the value of the cow before she was injured and the value of the cow for beef.

“3d. Where a cow was not destroyed as a milk cow, but permanently injured, you shall allow for loss of butter fat during the time she was injured so that she gave a less quantity of milk, then consider the amount of damage that was done to the cow, that is to say, the value of the cow before her injury, and the value of the cow as a milk cow after her injury.

“4th. Where a cow was not permanently injured, but only injured for a time, you shall allow for loss of butter fat during the time she

was injured and did not give her normal amount of milk.

“5th. If the machine did not produce as much milk when being used as if said cows had been milked by hand, and there was in consequence a loss of butter fat, you can take that into consideration and allow for such loss of butter fat. [329]

“In determining the loss of the use of the cow that is shown by the loss of butter fat, you should take into consideration the expense of keeping the cow, and not allow expense of pasturage and also loss of use of cows.”

Said defendant, said Sharples Separator Company, a corporation, now assigns as error the giving of said instruction to said jury by said Court.

And be it further remembered that each and all of the foregoing rulings and exceptions made and taken during the progress of said trial, were made and taken in the presence of said jury, while said jury was still at the bar of said court, and before said jury retired to deliberate upon its verdict. [330]

Thereupon and after the jury had retired to consider their verdict, the Court duly made and entered an order giving the defendant to and including the 5th day of December, 1916, within which to serve and file its bill of exceptions, and thereafter the said parties stipulated that the defendant should have to and including the 23d day of December, 1916, within which to serve and file its bill of exceptions, and upon which said stipulations the Court duly and regularly made an order giving said defendant to and including

the 23d day of December, 1916, within which to serve and file its bill of exceptions, and the said bill of exceptions has been prepared, served and filed within the time by law and extended by stipulations of counsel and the order of the Court, and counsel for defendant asks that the same be allowed and approved as correct.

And be it further remembered that the above and foregoing bill of exceptions is a full, true and correct statement of all the evidence in the cause, and also of all objections, rulings and exceptions relied on by said defendant Sharples Separator Company, a corporation, instructions requested by said defendant, but refused by said Court, charge of the Court and exceptions thereto, and other proceedings in and upon the said trial; and that no other different evidence, objections, rulings or exceptions relied on by said defendant, or instructions requested by said defendant but refused, or charge of the Court of other proceedings, were had in or upon said trial. And now, within due and proper time, said defendant, Sharples Separator Company, a corporation, presents and tenders this its said bill of exceptions to said Court, and in order that said exceptions may be preserved and perpetuated, and in furtherance of justice and that right may be done, the said defendant, Sharples Separator Company, presents [331] the foregoing as its bill of exceptions herein, and prays that the same may be settled, approved and allowed, as true and correct in all particulars, and signed and certified as provided by law and made a part of the records in the above-entitled cause.

Dated Los Angeles, California, December 23d, 1916.

SHARPLES SEPARATOR COMPANY, a
Corporation.

Said Defendant.

By WILLARD P. SMITH,
BICKSLER, SMITH and PARKE,
J. J. DUNNE,

Its Attorneys. [332]

BE IT FURTHER REMEMBERED, that on October 21st, 1916, a stipulation was duly entered into by and between the plaintiff and defendant, and order made and entered thereon, granting defendant until the 5th day of December, 1916, within which to prepare, serve and file its bill of exceptions; and that thereafter, to wit, on November 20th, 1916, a stipulation was entered into between the plaintiff and defendant, and order duly entered thereon, granting the defendant a further extension of time or until December 15th, 1916, within which to prepare, serve and file its proposed bill of exceptions; and that thereafter, to wit, on December 6th, 1916, it was stipulated by and between the plaintiff and defendant, and order duly entered thereon, granting defendant a further extension of time or until December 23d, 1916, within which to prepare, serve and file its proposed bill of exceptions; that the proposed bill of exceptions was duly served and filed on the 23d day of December, 1916. That at plaintiff's request, the following stipulation was duly entered into by and between the plaintiff and defendant:

“IT IS HEREBY STIPULATED by and between the plaintiff and the defendant, through their respective attorneys, that the time within which the plaintiff W. W. Skinner, may prepare, file and serve his proposed amendments to Defendant’s proposed Bill of Exceptions in the above-entitled action, be and *he* is hereby extended and enlarged until and including Wednesday, January 31st, 1917.

“IT IS FURTHER STIPULATED that a further stay of execution to and including the said 15th day of February, 1917, may be granted.

“DATED December 29th, 1916.”

That an order in accordance with the foregoing stipulation was duly entered by the Honorable Oscar A. Trippet, Judge.

That thereafter, to wit, on January 26th, 1917, on motion made in open court, by Dale H. Parke, Esq., of counsel for defendant, the attorney for plaintiff being then and there [333] present, but not consenting thereto, the following order was duly made, given and entered by the Honorable Oscar A. Trippet, Judge, which said order is as follows:

“On motion of Dale H. Parke, Esq., of counsel for defendant, it is ordered that said defendant be and they are hereby granted five days after the filing of proposed amendments to the proposed bill of exceptions herein within which to present said bill of exceptions and amendments for settlement.”

That thereafter, to wit, on the 31st day of January, 1917, the plaintiff served and filed proposed amend-

ments to the proposed bill of exceptions.

And thereafter, to wit, on the 3d day of February, 1917, the defendant served notice upon the plaintiff that the defendant dissented to the proposed amendments to the proposed bill of exceptions, and that on the 6th day of February, 1917, at the hour of 9:30 A. M., the defendant would present the proposed bill of exceptions and proposed amendments to the Honorable Oscar A. Trippet, Judge, for settlement.

That at 9:30 A. M. on the 6th day of February, 1917, the defendant, in the presence of attorney for plaintiff, who objected as hereinafter stated, presented the proposed bill of exceptions, and proposed amendments to the Honorable Oscar A. Trippet, Judge, for settlement. Said objection, so made by plaintiff as aforesaid, was to the presentation, settlement and signing of the said bill of exceptions on the ground that the said bill of exceptions had not been presented to the Judge for settlement and signing, nor was the same settled or signed within the time allowed by law or within the term of the Court at which the trial was had and judgment rendered and entered.

That thereafter, to wit, on the said 6th day of February, 1917, further time being necessary to make the corrections in the proposed bill of exceptions, on application of Dale H. Parke, Esq., of counsel for defendant, an order was duly [334] made, given and entered by the Honorable Oscar A. Trippet, Judge, over the objection of plaintiff, granting to the defendant additional time or until the hour of 10 o'clock A. M. on Saturday, the 10th day of Feb-

ruary, 1917, within which to present the proposed bill of exceptions as amended for settlement and signing. That no other or different orders or stipulations with respect to the time for filing, presentation and settling of the proposed bill of exceptions was made or entered herein. [335]

Stipulation Approving Bill of Exceptions.

IT IS HEREBY STIPULATED AND AGREED that the foregoing bill of exceptions is true and correct in all particulars and that the same may be made a part of the records in the above-entitled cause.

Dated Los Angeles, California, February 8th, 1917.

W. W. SKINNER,
Plaintiff.

By PHIL D. SWING,
His Attorney.

SHARPLES SEPARATOR COMPANY, a
Corporation,

Said Defendant.

By WILLARD P. SMITH,
BRISLER, SMITH and PARKE,
J. J. DUNNE,

Its Attorneys. [336]

Order Settling Bill of Exceptions.

United States of America,
Southern District of California,—ss.

In the matter of the foregoing bill of exceptions duly presented in time by the defendant, Sharples Separator Company, a corporation, plaintiff in error herein:

It is hereby ordered by said Court that said bill of exceptions be, and the same is hereby settled, allowed and approved as true and correct in all particulars; and it is hereby further ordered by said Court that said bill of exceptions be, and the same is hereby made a part of the records in the above-entitled cause.

Given, made, and dated at Los Angeles, California, this 9th day of Feb., A. D. 1917.

OSCAR A. TRIPPET,
United States District Judge. [337]

[Endorsed]: No. 413—Civil. In the District Court of the United States, Southern District of California, Southern Division. W. W. Skinner, Plaintiff, vs. The Sharples Separator Company, a Corporation, and Edgar Bros. Company, a Corporation, Defendants. Bill of Exceptions. Filed Feb. 9, 1917. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. [338]

In the District Court of the United States, in and for the Southern District of California, Southern Division.

No. 413—CIVIL.

W. W. SKINNER,

Plaintiff,

vs.

THE SHARPLES SEPARATOR COMPANY, a
Corporation,

Defendant.

Petition for Writ of Error.

The above-named defendant, the Sharples Separator Company, a corporation, conceiving itself aggrieved by the final judgment given, made and entered by the above-entitled court, in the above-entitled cause, upon the issues therein joined, under date of October 13th, A. D. 1916, said judgment being now on file in said cause and court, it hereby petitions the above-entitled court for an order allowing it to prosecute a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, in the State of California, from said judgment, and from the whole thereof, for the reasons set forth in the assignments of errors, which is filed herewith, under and pursuant to the law of the United States in that behalf made and provided; and it prays that this petition for said writ of error may be allowed, and that a transcript of the record, proceedings and papers upon which said judgment was given, made and entered as aforesaid, duly authenticated, may be [339] sent to the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California.

Dated January 13th, A. D. 1917.

WILLARD P. SMITH,

BICKSLER, SMITH & PARKE,

J. J. DUNNE,

Attorneys for Said Plaintiff in Error.

Receipt of a copy of the foregoing Petition is hereby acknowledged this 17 day of February, 1917.

PHIL D. SWING,

Attorneys for Defendants in Error.

[Endorsed]: Original. No. 413—Civil. In the United States District Court, in and for the Southern District of California, Southern Division. W. W. Skinner, Plaintiff, vs. The Sharples Separator Company, a Corporation, Defendant. Petition for Writ of Error. Filed Feb. 23, 1917. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. Willard P. Smith, Bicksler, Smith & Parke, 829 Citizens' Nat'l Bank Bldg., Fifth & Spring Sts., Los Angeles, Cal., Telephones: A-2752; Main 5166, J. J. Dunne, Attorneys for Defendant. [340]

In the District Court of the United States, in and for the Southern District of California, Southern Division.

No. 413—Civil.

W. W. SKINNER,

Plaintiff,

vs.

THE SHARPLES SEPARATOR COMPANY, a
Corporation,

Defendant.

Assignments of Error.

Now comes the above-named defendant, plaintiff in error herein, and says that in the record and pro-

ceedings in the above-entitled action there is manifest error, and now makes, presents and files the following assignments of errors upon which it will rely as follows, to wit:

I.

The evidence received upon the trial of the above-entitled action was and is wholly insufficient to justify the verdict of the jury impaneled in said action, in this: that there is no evidence upon which said jury could find that the milking machine furnished by the defendant in said action, caused the injury shown to have been sustained by plaintiff's cows.

II.

The evidence received upon the trial of the above-entitled action was and is wholly insufficient to justify the verdict of the jury impaneled in said action, in this: [341] that the plaintiff failed to introduce any evidence from which the jury might determine the amount of injury or loss, if any, that was sustained by plaintiff from the use of the three units purchased from the defendant, and the one unit purchased from Edgar Brothers Company.

III.

The evidence received upon the trial of the above-entitled action was and is wholly insufficient to justify the verdict of the jury impaneled in said action, in this: that the preponderance of the evidence shows that the injury actually resulting to plaintiff's cows, and the consequent loss of milk, if any, was due to the invasion of an infectious disease, not produced or caused by the operation of the machine furnished by the defendants.

IV.

The evidence received upon the trial of the above-entitled action was and is wholly insufficient to justify the verdict of the jury impaneled in said action, in this: that the preponderance of the evidence shows that the plaintiff's cows were affected with an infectious disease, and that such infectious disease was not and could not have been caused by the operation of the milking machine furnished by the defendant.

V.

The evidence received upon the trial of the above-entitled action was and is wholly insufficient to justify the verdict of the jury impaneled in said action, in this: that the evidence does not show that the plaintiff was damaged in the amount found by the jury. [342]

VI.

The evidence received upon the trial of the above-entitled action was and is wholly insufficient to justify the verdict of the jury impaneled in said action, in this: that the preponderance of the evidence shows that a large part of the damage sustained by the plaintiff's cattle resulted from a lack of proper care and treatment thereof by the plaintiff and that had said plaintiff treated said cows in a proper and careful manner, a large part of the injury sustained by said cattle would have been prevented.

VII.

The evidence received upon the trial of the above-entitled action was and is wholly insufficient to justify the verdict of the jury impaneled in said action, in this: that the preponderance of the evidence shows

that the defendant committed no breach of warranty, and that whatever damage was suffered by the plaintiff was the result of other causes than the operation of the milking machine furnished by the defendant.

VIII.

The verdict and/or judgment given and made in the above-entitled cause was and is contrary to and against the law and the evidence, because of errors of law occurring during the trial and excepted to by the above-named defendant and hereinafter included in these assignments of errors.

IX.

The verdict and/or judgment given and made in the above-entitled cause was and is contrary to and against the law and the evidence, because of the insufficiency of the [343] evidence to justify said verdict and/or judgment, the particulars of such insufficiency being included in these assignments of errors.

X.

The verdict and/or judgment given and made in the above-entitled cause was and is contrary to and against the law and the evidence, in this, that the preponderance of the evidence shows that the damage sustained by plaintiff's cattle resulted from the invasion into the udders of said cattle of an infectious disease, not caused by the operation of the milking machine furnished by defendant, and the jury were instructed by the Court that the defendant was not liable for such damage resulting from such infectious disease.

XI.

The verdict and/or judgment given and made in the above-entitled cause was and is contrary to and against the law and the evidence, in this, that the amount of damages awarded the plaintiff by the jury is excessive, and finds no support in the evidence, and is contrary to the instructions of the Court, in that the jury in arriving at the amount of damages stated in its verdict awarded plaintiff damage not only for the injury sustained by his cattle, but also for loss of milk; and also allowed plaintiff for the injury, if any, which resulted to his cattle from the use and operation of the fourth unit purchased by him from Edgar Brothers.

XII.

The verdict and/or judgment given and made in the above-entitled cause was and is contrary to and against the [344] charge of the Court to the jury in said action, in this, that the jury awarded the plaintiff damages which resulted from the use and operation of the fourth unit of the milking machine which was purchased from Edgar Brothers, in violation of the instructions of the Court that the defendant was not liable for such damage.

XIII.

The verdict and/or judgment given and made in the above-entitled cause was and is contrary to and against the charge of the Court to the jury in said action, in this, that in arriving at the verdict the jury duplicated damages in allowing to the plaintiff full value for all cows claimed by him to have been injured, and also allowing to the plaintiff a sum of

money for loss of butter fat, and for pasturage of his cattle after the alleged injury occurred, and in so doing the jury disregarded the instructions of the Court, that it should not, in arriving at its verdict, duplicate damages.

XIV.

The verdict and/or judgment given and made in the above-entitled cause was and is contrary to and against the charge of the Court to the jury in said action, in this, that the evidence shows that the damage resulting to plaintiff's cattle, and the consequent loss of butter fat or milk, if any, was the result of the invasion into the udders of plaintiff's cattle of an infectious disease, and under the instructions of the Court the plaintiff was not entitled to recover anything for damages resulting from said cause. [345]

XV.

The verdict and/or judgment given and made in the above-entitled cause was and is contrary to and against the charge of the Court to the jury in said action, in this, that the evidence shows that a large part, or all of the damages sustained by plaintiff's cattle, could have been prevented had the plaintiff given to said cattle prompt and careful treatment, and under the instructions given by the Court the defendant could not be held liable for damage which might have thus been prevented by prompt and careful treatment of the cattle by the plaintiff.

XVI.

Said Court erred in overruling the objection of said defendant to the introduction in evidence be-

fore said jury of the following printed matter:

“A lifetime study in the dairyman’s interest enabled these experts to solve the apparently impossible problem of automatic or mechanical milking.”

“The gentle massage of the teat cup with its uniform action induces the cows to let down the milk freely, a condition which frequently increases milk production.”

“The teat cup with upward squeeze always is soothing, even tempered, never in a hurry. After drawing each squirt of milk it gently massages the cow’s teats, keeping the teats and udder of the most delicate or hardiest cow in a soft, cool, natural, perfect condition, free from congestion.”

“By the proper use of this all important feature, which is obtainable only in the Sharples Milker, the teats and udder of either the most delicate or the most hardy [346] cows are kept in a soft, cool, natural condition. Until we made this discovery, we never thought of offering a machine for sale, though long before that time we were owners of patents on the best pulsating suction milkers ever devised.”

These statements merit special consideration.

They are conservative—”

Said objection was made upon the grounds that said printed matter was incompetent, irrelevant and immaterial, and upon the ground that the present cause was a case of a written warranty; said objection was then and there overruled by said Court, and

said printed matter was then and there received and read in evidence to said jury, to which ruling and action of said Court, said defendant then and there duly excepted; and said defendant now assigns said ruling as error.

XVII.

Said Court erred in overruling the objection of said defendant to the introduction in evidence before said jury of the following printed matter:

“The Sharples Mechanical Milker is quite different from others which give the teats an upward squeeze, which not only absolutely prevents all irritation of teats and udders but actually benefits the cows and improves the flow of milk.”

Said objection was made upon the grounds that said printed matter was incompetent, irrelevant and immaterial, and upon the ground that the present cause was a case of a written warranty; said objection was then and there overruled by said Court and said printed matter was then and [347] there received and read in evidence to said jury, to which ruling and action of said Court, said defendant then and there duly excepted; and said defendant now assigns said ruling as error.

XVIII.

Said Court erred in overruling the objection of said defendant to the introduction in evidence before said jury of the following printed matter:

“Q. Is it safe to milk high-grade cows with the Milker? A. This question has already been answered pretty thoroughly. The high-

grade cow is much safer when milked by the Sharples Milker than when milked by hired help, and just as safe as when milked by the owner himself.

“A. Does it not have a harmful effect on some cows? A. From our knowledge of what the milking machine has accomplished on the 80,000 cows upon which it is used daily, we know that the Sharples Milker has a tendency to increase the production of milk. Of some cows it does not seem to increase the production, of others it increases it anywhere up to 10%.

“If the hand milkers have been poor, the Sharples Milker practically always shows an increase in milk production. The reason for this is that the ‘upward squeeze’ keeps the teats in perfect condition. The cows are milked with an even and regular motion studied by us and made correct. If the hand milkers were very good it is probable that the machine will not be able to improve upon them; otherwise, the probabilities are that it will. We know positively that the Sharples Milker never has an ill-effect upon the cows, provided the machine is kept in reasonable [348] order, and we keep enough experts out on the territory to see that all dairymen do keep their machines in good order.

“There is not the least tendency to dry up the cows prematurely nor have any other harmful effect.”

Said objection was made upon the grounds that said printed matter was incompetent, irrelevant and

immaterial, and upon the ground that the present cause was a case of a written warranty; said objection was then and there overruled by said Court and said printed matter was then and there received and read in evidence to said jury, to which ruling and action of said Court said defendant then and there duly excepted; and said defendant now assigns said ruling as error.

XIX.

Said Court erred in receiving, and in denying the motion of said defendant to strike out, the following answer and statement of said plaintiff during his direct examination, to wit:

“They was to send this demonstrator there once a month to go through my herd and see if everything was working all right.”

Said motion to strike out was made upon the grounds that the statement of the witness as to the duties on the part of said defendant, was incompetent; said statement and answer of said witness was then and there received and given in evidence to said jury, to which ruling and action of said Court said defendant then and there duly excepted; and said defendant now assigns said ruling as error. [349]

XX.

Said Court erred in receiving, and in denying the motion of said defendant to strike out, the following testimony as given by said plaintiff during his direct examination as set forth in defendant's bill of exceptions, exception Number 5, as follows:

“The WITNESS.—I can't well state what he did without I tell you what passed between us.

Briggs, he wanted to start the machine again, and I would not agree to it.

Mr. PARKE.—We move to strike that out, as to what Briggs wanted to do.”

Said motion to strike out was then and there denied by the Court, to which ruling said defendant, Sharples Separator Company, a corporation, then and there duly excepted, and now assigns said ruling as error.

XXI.

Said Court erred in overruling defendant’s objection to the following testimony as set forth in defendant’s bill of exceptions, Exception Number 6, as follows:

“The WITNESS.—I finally agreed that if they would take charge of the machine on thirty cows—

Mr. PARKE.—If the Court please, we object to any agreements entered into by and between Skinner and Mr. Briggs, or anything in the nature of a warranty; this machine was sold on a written warranty. Briggs had no authority to contract.”

Said objection was then and there overruled by the Court, to which ruling said defendant, Sharples Separator Company then and there duly excepted, and now assigns said ruling as error. Thereupon the witness testified as [350] follows:

“The WITNESS.—Briggs wanted to start the machine: I told him I would not let him do it; that was first; he then came back again; he and I went to Mr. Edgar Bros. and we came to

an agreement; and we came to an agreement; that is the writing I entered into; my signature is at the bottom there; that is my signature; this H. S. King is Mr. Edgar Bros. man—I desired a witness; but for my receiving this written paper I would not have allowed Reed to re-start the machine.”

XXII.

Said Court erred in permitting the plaintiff to amend his complaint, as set forth in defendant’s bill of exceptions, Exception Number 7, as follows:

“The COURT.—You may amend your complaint, if you wish to. The objection is overruled.

Mr. PARKE.—Note an exception.”

To which ruling said defendant, said Sharples Separator Company, then and there duly excepted, and now assigns said ruling as error.

XXIII.

Said Court erred in overruling the objection of said defendant to the following question addressed to the plaintiff during his direct examination, as set forth in defendant’s bill of exceptions, Exception Number 8, as follows:

“Q. Did you suffer any loss as the result of the operation of this milker upon your herd in the quantity or amount of milk or butter fat you received from that herd?”

Said objection was made upon the ground that said [351] question called for a conclusion of the witness. Said objection was overruled by said Court, to which ruling said defendant then and there noted an

exception, and now assigns said ruling as error. Thereupon, the witness testified as follows:

“I did.”

XXIV.

Said Court erred in denying defendant's motion to strike out testimony as set forth in defendant's bill of exceptions, Exception Number 9, which said motion is as follows:

“Mr. PARKE.—The Sharples Separator Company, a corporation, moves to strike out all of the testimony of the witness on the value of the milk, as stating a mere conclusion.”

Said motion was then and there denied by the Court, to which ruling said defendant, Sharples Separator Company, a corporation, then and there duly excepted, and now assigns said ruling as error. Said testimony so retained was as follows:

“The WITNESS.—The milk that I lost by reason of this amounts, I think, to \$1500—the value of it.”

XXV.

Said Court erred in permitting said plaintiff to file an amendment to his amended complaint, as to damages, as set forth in defendant's bill of exceptions, Exception Number 10.

Said defendant objected to the filing of said amendment on the ground that it attempts to set out elements of damage not set out in the original complaint, or in the [352] bill of particulars furnished by the plaintiff; and upon the ground that this defendant has had no opportunity of investigating the question of damage set out in the amendment;

and that at this time the plaintiff should not be permitted to insert other and different claims for damages than those covered by his original bill of particulars and complaint.

Said objection was then and there overruled, by said Court, and said amendment permitted, to which ruling and action of said Court, said defendant then and there duly excepted and now assigns said ruling as error.

XXVI.

Said Court erred in overruling defendant's objection to the testimony as set forth in defendant's bill of exceptions, Exception Number 11, as follows:

"The COURT.—Q. Did you consent to its being used on your cows by reason of what Briggs induced you to do?

Mr. PARKE.—I dislike to object to the Court's questions but we object to the question as to the conditions under which he started the use of the machine."

Said objection was then and there overruled by the Court, to which ruling said defendant, said Sharples Separator Company, then and there duly excepted, and now assigns said ruling as error. Thereupon the witness testified as follows:

"The WITNESS.—Yes, sir. In October the machine was used practically two months, and a man by the name of Reed operated it. I did not employ Reed. Mr. Reed came and took charge of the machine on a string of cows. Mr. Reed and [353] Mr. Briggs were there when the machine started, and they selected their cows

that had not been injured, young cows, and then selected a herd that they thought the machine would milk. I don't know that they thought that. At least, they picked such cows as they wanted. I had nothing to do with it. I told them to pick the herd and get just such cows as they wanted. I had nothing to do with selecting the cows. The machine had gotten dirty. They took those things and boiled them, and put in new rubbers, and started them up on those thirty cows. Mr. Reed had absolute control of it. I had nothing to do with it at all. It had not been there but just a little *but*, and a cow came into the corral with one of those bad quarters. I had cows that had not been milked with the milker in that herd. There were two strings. Some of those cows had had a milker on them in June and July. I had cows that this milker was not put on at any time. It is a hard question to answer, how many. I had some young cows. No cows got diseased that were not milked with the milker. Up to July they milked all the cows with the milker. I had some cows that came in after that that were not milked with the milker, but they selected some of those cows that had come in, young cows, and put the machine on them in October and November. After October seven of the cows were hurt and some of them injured. I only claim those absolutely ruined for dairy purposes. Some of them were injured that I put in no claim for. And as to the value of those cows what I say were ruined, I would

have to get my instructions out again to segregate those different cows.” [354]

XXVII.

Said Court erred in overruling defendant’s objection to the testimony as set forth in defendant’s bill of exceptions, exception Number 12, as follows:

“Mr. SWING.—Q. With reference to the guarantee which he gave you, or purported to give you at the time he consented to restarting the milker, I will ask you if at any time since you have ever received any notice or intimation from the company that that was not a valid contract or guarantee?

Mr. PARKE.—We object to the question—that a guarantee was given by Briggs; and if that alleged contract was not binding upon the company, it would not make any difference whether they ever repudiated it or not, if there was no consideration therefor.”

Said objection was then and there overruled by said Court, to which ruling of the Court the defendant, said Sharples Separator Company, a corporation, then and there duly excepted, and now assigns said ruling as error. Thereupon the witness testified as follows:

“The WITNESS.—They did not notify me.”

XXVII.

Said Court erred in overruling defendant’s objection to the testimony set forth in defendant’s bill of exceptions, exception Number 13, as follows:

“The COURT.—Did they ever notify you that

Briggs was not their agent and had no authority to do what he did do?

Mr. PARKE.—We object to the question upon all of the grounds heretofore stated.”

Said grounds are stated in assignment of error number XXVII. [355]

Said objection was then and there overruled by the Court, to which ruling said defendant, said Sharples Separator Company, then and there duly excepted, and now assigns said ruling as error. Thereupon the witness testified as follows:

“The WITNESS.—No, sir.”

XXIX.

Said Court erred in receiving, and in refusing to strike out the answer of the witness “No, sir” to the question, “Did they ever notify you that Briggs was not their agent and had no authority to do what he did do during the direct examination of said plaintiff,” as set forth in defendant’s bill of exceptions, Exception Number 14.

Said motion was made upon the grounds that no alleged contract by Briggs was binding upon the company, and that it would not make any difference whether the company repudiated it or not if there was no consideration therefor.

Said motion to strike out was then and there denied by said Court, to which ruling said defendant then and there duly excepted, and now assigns said ruling as error.

XXX.

Said Court erred in overruling defendant’s objection to the testimony set forth in defendant’s bill of

exceptions, Exception Number 14-A, as follows:

“Mr. SWING.—Q. At the time Albert J. Reed quit, if he did, on December 20th, state what, if anything, he said at the time he quit?

A. When Mr. Reed quit? [356]

Q. Yes.

Mr. PARKE.—We object to that as incompetent, irrelevant and immaterial, and there is no evidence before the Court of any kind, nature or description, that Reed was the agent of the Sharples Separator Company.”

Said objection was then and there overruled by the Court, to which ruling said defendant, said Sharples Separator Company, then and there duly excepted, and now assigns said ruling as error. Thereupon the witness testified as follows:

“The WITNESS.—The first intimation that I had that Mr. Reed was going to quit, I walked into the corral, and there was one of the cows showed she was not feeling good, and I was in a hurry and was going to the ranch, and I said, ‘Mr. Reed, is that cow sick?’ He said, ‘Look at her bag.’ And I just stopped, and it was a heifer, and the bag was all swollen up. And I didn’t say a word, and Mr. Reed didn’t, for a half a minute, and then Mr. Reed said, ‘Skinner, I am going to quit. I have ruined the last cow with this machine that I expect to ruin.’ He quit, and I took him to town, and after he got to town, the first thing he did, he went in and talked to Mr. Edgar. He made, in my presence, a

statement to Mr. Edgar regarding his ability or inability to run the machine.

XXXI.

Said Court erred in overruling defendant's objection to the testimony set forth in defendant's bill of exceptions, Exception Number 15, as follows:

"The WITNESS.—(Continuing.) Reed quit. After he went to town he sent Mr Frank a telegram. I saw the telegram written. It was written by Mr. Reed.

Q. Do you know his handwriting, or are you able to [357] identify that? (Handing a paper to the witness.)

A. It is very much like it; I believe it is.

Mr. SWING.—We offer now in evidence the copy written by Reed, which is attached to this deposition, which Reed testified is his handwriting, and which he wrote, and also the original furnished by the company, which is word for word like this. I offer the two.

Mr. PARKE.—We object to that as incompetent, irrelevant and immaterial, and further that no evidence is before the Court that Reed was an agent for the Sharples Separator Company, or any other employee at this time."

Said objection was then and there overruled by said Court, to which said ruling said defendant, Sharples Separator Company, then and there duly excepted, and now assigns the same as error. Thereupon said copy and original was received and read in evidence to the jury as follows:

"Mr. SWING.—I will read this to the jury:

‘El Centro, California, December 18, 1914, Sharples Separator Company, 420 Mission Street, San Francisco. Have done everything possible. Serious trouble started again. Taking too big risk to continue use of machine. We have discussed every possible phase of situation, to quit milking safest way, or we will have too big a loss according to our agreement. Will await instructions here. Wire at once. Albert J. Reed.’ ”

XXXII.

Said Court erred in overruling defendant’s objection to the testimony set forth in defendant’s bill of exceptions, Exception Number 16, as follows:

“Mr. SWING.—Was it started before or after that [358] written paper was signed by Mr. Briggs?

Mr. PARKE.—We object to that. There is no evidence of a written contract of any kind.

The COURT.—Objection overruled.

Mr. PARKE.—Note an exception.”

Said defendant, said Sharples Separator Company, a corporation, now assigns said ruling as error. Thereupon the witness testified as follows:

“The WITNESS.—After. Briggs was there for one milking, after Reed came, and then a time or two after; Briggs helped Reed to sterilize everything and get it milking. Reed operated it from October until just after Christmas, and while the machine was being operated something like seven or eight cases, I think, of swollen quarters developed. During that time no

new cases of swollen quarters developed among the two strings that were being milked by him. As to what cows Briggs and Reed put the milker on when they started on October 20th, they selected a string of good cows. I think they were mostly young cows that had not been used on the milking machine before. Some of the cows had had their first calves; I don't know how many. As to what was the occasion of Reed's quitting on December 20th, why, when he came into the kitchen—he always came into the kitchen where I was—when he came in, he said he wasn't going to put the milker on another cow; and I wanted to know why, and the words that he used was that he had ruined the last cow for use with a milking machine that he was going to."

XXXIII.

Said Court erred in overruling the objection of said [359] defendant to the following question asked of said plaintiff when recalled as a witness in his own behalf for further redirect examination, as set forth in defendant's bill of exceptions, Exception Number 17, as follows:

"Q. At the time, Mr. Skinner, you purchased the three units from Mr. Hickson representing the Sharples Separator Company, what, if anything, was said by him as to the manner or way you could purchase another unit if you so desired?"

Said objection was made upon the grounds that said question was incompetent, irrelevant and imma-

terial and also sought to develop matters already testified to.

Said objection was overruled by said Court, to which ruling of said Court said defendant then and there duly excepted and now assigns said ruling as error.

Thereupon the witness testified as follows:

“A. Why, Mr. Hickson was there, with Mr. Edgar’s man, and he told me any time I wanted another unit I could either order it through them or notify Mr. Edgar, and they would get the unit for me.”

XXXIV.

The Court erred in denying defendant’s motion, as set forth in defendant’s bill of exceptions, Exception Number 18, as follows:

“Thereupon the defendant, Sharples Separator Company, made the following motion:

“We desire to move for a nonsuit, on the ground that it appears from the evidence that the damage, if any, suffered, even under the testimony of the plaintiff, was for the indiscriminate use of the four units, and it further appearing from the evidence that one unit was purchased [360] from Edgar Brothers, and three from the Sharples Separator Company, and no evidence having been introduced, and no basis given upon which the jury or the Court could arrive at the damage, if any, which ensued from the three units purchased from the defendant, Sharples Separator Company, or the damage which resulted from the unit purchased by the

plaintiff from Edgar Brothers Company. Upon the further ground that the testimony as offered by the plaintiff is not sufficient to support a verdict in his favor, there being no showing that the milking machine caused any damage to the cows.'

The COURT.—I will overrule your motion. Exception granted."

And said defendant, said Sharples Separator Company, a corporation, now assigns said ruling as error.

XXXV.

Said Court erred in sustaining the plaintiff's objection to defendant's testimony, as set forth in defendant's bill of exceptions, Exception Number 19, as follows:

"The WITNESS.—I have seen a Sharples' milking machine, and have seen them in operation. I have examined the udder of cows upon which the Sharples milking machine was being used. The last place I examined was at Westchester, at a dairy that is run at the experimental farm of the Sharples Separator Company. I was in Philadelphia this summer and went down there. I am not in the employ of the Sharples Separator Company. I simply went there to observe it.

Q. State what you observed in the condition of the udders of those cows. [361]

Mr. SWING.—We object to the question on the ground that the evidence as to how other machines worked is not admissible to show com-

pliance with the warranty; and we object to the question on the ground as incompetent, irrelevant and immaterial, how some other machine worked, and on the additional ground that no foundation has been laid.

The COURT.—I will sustain the objection as to the cows at Westchester, Pennsylvania.

Mr. PARKE.—Note an exception.”

And said defendant, said Sharples Separator Company, a corporation, now assigns said ruling as error.

The following is the substance of the evidence rejected:

“The udders of those cows were in perfectly good condition, and free from disease and injury of any kind.”

XXXVI.

ⁱ Said Court erred in sustaining plaintiff’s objection to the defendant’s testimony, as set forth in defendant’s bill of exceptions, Exception Number 20, as follows:

“Q. State whether or not during the year 1914 milk or any other dairy products from the Imperial Valley were permitted in the city of Los Angeles to be shipped here for consumption in Los Angeles City.

Mr. SWING.—Objected to as incompetent, irrelevant and immaterial.”

Said objection was then and there sustained by said Court, to which ruling the defendant said Sharples Separator Company, then and there duly excepted, and now assigns said ruling as error.

The following is the substance of the evidence re-
[362] jected: "No, sir."

XXXVII.

Said Court erred in overruling defendant's objection to the following question addressed on cross-examination to the witness Dr. George H. Hart, as set forth in defendant's bill of exceptions, Exception Number 21, as follows:

"Q. Doctor, assuming that the plaintiff in this case, in February, 1914, had a healthy herd of some 90 dairy cows, all of which had been entirely free from garget since the herd had been collected, that plaintiff then bought a Sharples mechanical milker, which was installed by an expert operator, furnished by the defendant company, who after installing the machine, instructed plaintiff, his son and hired man, in the care and operation of the milker and remained with plaintiff until he pronounced the machine properly installed and adjusted and plaintiff and his milkers proficient in the operation of the machine; that thereafter the machine was cared for and operated by the persons who had received instructions as aforesaid, and was cared for and operated in accordance with the instructions furnished by the defendant company; that after the milking machine had been so used on plaintiff's cows for about thirty days, said cows began developing swollen quarters; that the cows showing swollen quarters were promptly taken off of the milker and thereafter milked by hand, following which hand milking the

swelling rapidly disappeared and did not reappear in the affected quarters, or in any other quarter of that cow, so long as she was milked by hand, or in the udders of any other cow in the herd, being milked my hand; that the cows [363] which were being milked by hand were subjected to the same conditions of feed, water, quarters, exposure, surroundings, and handling as were the cows being milked by the milker, i. e., all the cows whether milked by the milker or by hand, were subjected at all times to the same identical conditions and surroundings, with the one exception, that one part were being milked by the milker and the other part were being milked by hand, that notwithstanding which the cows which were being milked by the milker continued to develop swollen quarters so long as the milker remained in operation upon them, while in those being milked by hand the existing swelling rapidly disappeared and did not reappear so long as they were milked by hand; that on the 25th day of June, 1914, the defendant, the Sharples Separator Company, sent its expert operator to plaintiff's ranch and he took charge of all the plaintiff's cows and of the milking machine and after thoroughly disinfecting the machine and the premises, began milking all of the plaintiff's cows with the milker, including those cows which had theretofore had swollen quarters; that in a very short time the swellings reappeared in the cows which had theretofore had it, in an aggravated form,

which became so intense in the case of about 17 cows, as to stop the passage of milk from the udders; that said expert operator stopped operating the machine about July 7th, 1914, and the milker was not again operated until about October 20, 1914; that in said interval all the cows were milked by hand and during that time no new cases of swollen quarters appeared; that on October 20, 1914, the milker was again begun by the same expert operator, who had operated from June 25th to July 7th, and he continued operating it [364] on about 30 cows up until December 20, 1914; that the cows on which said milker was so operated were cows selected by said operator and which had not theretofore shown any udder trouble; that during those two months, between 8 and 12 of the cows being milked by the milker developed swollen quarters, that of the 60 odd remaining cows of the herd being milked during the same period by hand, developed no new cases of swollen quarters; that the cows which were being milked by the milker and the cows that were being milked by hand during said period, were subjected at all times to the same identical conditions and surroundings with the one exception, that the one part were being milked by the milker and the other part were being milked by hand; that said expert operator stopped operating the same machine on December 20, 1914, and the same has not since been operated on any of plaintiff's cows; that plaintiff has never had any such case

or any similar case of swollen quarters in his herd before beginning the use of the milker and there has been no case of swollen quarters in his herd since the milking machine quit, would you say, under those circumstances, that the condition referred to in the question, the udder trouble of Skinner's cows, was caused by bacteria in the first place, or by some injury from the milking machine?"

Said objection was made upon the ground that said question was incompetent, irrelevant and immaterial, and that it assumed conditions not pertinent and not in evidence.

Said objection was overruled by said Court and said defendant then and there excepted to said ruling and now assigns said ruling as error.

Thereupon the witness testified as follows: [365]

"A. Just what is the question,—whether the trouble was caused by the milking machine, or whether it was caused by bacteria?"

Mr. SWING.—Yes, sir; in the condition stated by my question.

A. The ultimate trouble was due to bacteria. The primary cause in this case, there being only part of the animals that were milked by the milking machine that were affected—is not that what your question said?

The COURT.—That is what he states in his question.

The WITNESS.—(Continuing.) That in this case the milking machine could have provided a condition in the udder in this percentage of ani-

mals which may have been easy milkers or hard milkers, and as the rules of the company show, should be handled under slightly different conditions, but they may not have been so handled, or they may have been so handled, but nevertheless the milking machine may have, under those conditions, produced a favorable field for these bacteria to multiply. They may have caused some kind of an injury, or some kind of a reduction of those tissues through the resistances which they ordinarily have. I am familiar with the instructions furnished by the Sharples Separator Company for the operation of their machine. I do not remember that I ever found in there any place where it said to boil the teat cups; it mentions putting them in an antiseptic solution, lime."

XXXVIII.

Said Court erred in sustaining plaintiff's objection to defendant's testimony as set forth in defendant's bill of exceptions, Exception Number 22, as follows:

"The COURT.—Now, if you operate this machine as [366] directed in this book, is it a successful machine? A. Yes.

Q. Would it hurt the cow's bag? A. No.

Mr. PARKE.—Now, just explain on what you base your answer to the question asked by the Court.

A. When the machines were installed in our herd, we had a book of instructions, and we followed it.

The COURT.—I don't care anything about your herd.

A. Well, those are the instructions.

Mr. PARKE.—Well, if the Court please, I insist that the witness has a right to give the reasons upon which he bases his answer, whether or not the machine is a success. He says it is a success, and he has a right to give the reasons upon which he bases that opinion.

Mr. SWING.—Our objections to the offer as it now stands are that it does not include any offer to show that the conditions under which this machine was operated were similar or identical with those under which the machine of the plaintiff was operated.

The COURT.—Objection sustained.

Mr. PARKE.—Note an exception."

And said defendant, said Sharples Separator Company, a corporation, now assigns said ruling as error.

XXXIX.

Said Court erred in sustaining plaintiff's objection to defendant's testimony as set forth in defendant's bill of exceptions, Exception Number 23, as follows:

"Q. State whether or not you got as much milk from a dairy herd of two hundred cows at the Shore Acres dairy as [367] you did from hand milking?

Mr. SWING.—We object to that; it is incompetent, irrelevant and immaterial.

The COURT.—Objection sustained.

Mr. PARKE.—Note an exception."

And said defendant, said Sharples Separator

Company, a corporation, now assigns said ruling as error.

The following is the full substance of the evidence rejected:

“The WITNESS.—A. Yes, sir.”

XL.

Said Court erred in sustaining the objection of said plaintiff to the offer of said defendant in evidence of the contract signed by Edgar Bros. Company by J. H. Edgar and marked “Defendant’s Exhibit, No. 2” herein as set forth in said Bill of Exceptions, Exception Number 24.

To the ruling of said Court sustaining said objection, said defendant then and there duly excepted, and said defendant now assigns said ruling as error.

XLI.

Said Court erred in sustaining the objection of said plaintiff to the following question asked upon the direct examination of the witness Albert John Reed, as set forth in defendant’s bill of exceptions, Exception Number 25, as follows:

“Q. Were they the same kind of machines that the plaintiff W. W. Skinner was using near El Centro?”

Said objection was based upon the ground that said question was incompetent, irrelevant and immaterial and called for the conclusion of the witness.

[368]

To the ruling of said Court sustaining said objection, said defendant then and there duly excepted, and now assigns said ruling as error.

The following is the full substance of the evidence rejected:

“The WITNESS.—A. Yes, sir.

XLII.

Said Court erred in overruling defendant’s objection to the plaintiff’s testimony as set forth in defendant’s bill of exceptions, Exception Number 26, as follows:

“Mr. SWING.—For whom did you install—for whom were you working when you installed the mechanical milker?

Mr. PARKE.—We object to that question on the ground it is not proper cross-examination, and was not called for in the direct examination.

The COURT.—Objection overruled.

Mr. PARKE.—Note an exception.”

And said defendant, said Sharples Separator Company, a corporation, now assigns said ruling as error. Thereupon said witness testified as follows:

“A. I was working for the Sharples Separator Company.”

XLIII.

Said Court erred in overruling the objection of said defendant to the following question addressed to the witness Albert J. Reed on cross-examination, as set forth in defendant’s bill of exceptions, Exception Number 27, as follows:

“Q. How long have you been working for them approximately?” [369]

Said question was objected to upon the ground that it was not proper cross-examination, and was

not called for in the direct examination.

Said Court overruled said objection, to which ruling said defendant then and there duly excepted, and now assigns said rulings as error. Thereupon the witness testified as follows:

“A. I started to work for them on the first of June, 1913, and continued to work for them until January 15, 1915.”

XLIV.

Said Court erred in overruling the objection of said defendant to the following question addressed to the witness Albert J. Reed on cross-examination as set forth in defendant's bill of exceptions, Exception Number 28, as follows:

“Q. About how many dairies are you acquainted with down there?”

Said objection was based upon the ground that said question was not proper cross-examination.

Said Court overruled said objection, to which ruling said defendant then and there duly excepted, and now assigns said ruling as error. Thereupon the witness testified as follows:

“A. I am acquainted with some half a dozen down there.”

XLV.

Said Court erred in overruling the objection of said defendant to the question addressed to said witness Albert J. Reed on cross-examination, as set forth in said defendant's bill of exceptions, Exception Number 29, as follows: [370]

“Q. Did you ever warn Skinner not to use water out of this water hole?”

Said objection was based upon the ground that said question was not proper cross-examination.

Said Court overruled said objection, to which ruling said defendant then and there duly excepted, and now assigns said ruling as error. Thereupon the witness testified as follows:

“A. When I went down in June and July I did.”

XLVI.

Said Court erred in overruling the objection of said defendant to the following question addressed to the witness Albert J. Reed on cross-examination, as set forth in said defendant's bill of exceptions; Exception Number 30, as follows:

“Q. What was done?”

Said objection was based upon the ground that said question was not proper cross-examination.

Said Court overruled said objection, to which ruling said defendant then and there duly excepted, and now assigns said ruling as error. Thereupon the witness testified as follows:

“A. Boiled water was used then; he followed my suggestion.”

XLVII.

Said Court erred in overruling said defendant's objection to the following question addressed to said witness Albert J. Reed on cross-examination, as set forth in said defendant's bill of exceptions, Exception Number 31, as follows: [371]

“Q. How many times were you there, at Skinner's place?”

Said objection was based upon the ground that

said question was not proper cross-examination.

Said Court overruled said objection, to which ruling said defendant then and there duly excepted, and now assigns said ruling as error. Thereupon the witness testified as follows:

“A. Well, I have been there a dozen times, off and on. I was there first in the first part of February, and remained for twelve or fourteen days. The occasion of my being there at the time was to install a mechanical milker. I was next there in the latter part of March, or the first of April.”

XLVIII.

Said Court erred in overruling the objection of said defendant to the following question addressed to the witness Albert J. Reed on cross-examination, as set forth in said defendant's bill of exceptions, Exception Number 32, as follows:

“Q. About how long were you there at that time ”

Said objection was based upon the ground that said question was not proper cross-examination.

Said Court overruled said objection, to which ruling said defendant then and there duly excepted, and now assigns said ruling as error. Thereupon the witness testified as follows:

“A. Two or three milkings.”

XLIX.

Said Court erred in overruling the objection of said defendant to the following question addressed to the [372] witness Albert J. Reed, on cross-examination, as set forth in defendant's bill of ex-

ceptions, Exception Number 33, as follows:

“Q. What was the occasion of your being there that time?”

Said objection was based upon the ground that said question was not proper cross-examination.

Said Court overruled said objection, to which ruling said defendant then and there duly excepted, and now assigns said ruling as error. Thereupon the witness testified as follows:

“A. Trouble.”

L.

Said Court erred in overruling the objection of said defendant to the following question addressed to the witness Albert J. Reed on cross-examination, as set forth in said defendant’s bill of exceptions, Exception Number 34, as follows:

“Q. What was the trouble?”

Said objection was based upon the ground that said question was not proper cross-examination.

Said Court overruled said objection, to which ruling said defendant then and there duly excepted, and now assigns said ruling as error. Thereupon the witness testified as follows:

“A. Skinner’s trouble with his cows.”

LI.

Said Court erred in overruling the objection of said defendant to the following question addressed to the witness Albert J. Reed on cross-examination, as set forth in said defendant’s bill of exceptions, Exception Number 35, as [373] follows:

“Q. What was the occasion of your being called in?”

Said objection was based upon the ground that said question was not proper cross-examination.

Said Court overruled said objection, to which ruling said defendant then and there duly excepted, and now assigns said ruling as error. Thereupon the witness testified as follows:

“A. I was the expert in charge.”

LII.

Said Court erred in overruling the objection of said defendant to the following question addressed to the witness Albert J. Reed on cross-examination, as set forth in said defendant's bill of exceptions, Exception Number 36, as follows:

“Q. An expert in charge for whom?”

Said objection was based upon the ground that said question was not proper cross-examination.

Said Court overruled said objection, to which ruling said defendant then and there duly excepted, and now assigns said ruling as error. Thereupon the witness testified as follows:

“A. Sharples Separator Company.”

LIII.

Said Court erred in overruling the objection of said defendant to the following question addressed to the witness Albert J. Reed on cross-examination, as set forth in said defendant's bill of exceptions, Exception Number 37, as follows:

“Q. How long were you there at that time?”

[374]

Said objection was based upon the ground that said question was not proper cross-examination.

Said Court overruled said objection, to which rul-

ing said defendant then and there duly excepted, and now assigns said ruling as error. Thereupon the witness testified as follows:

“A. I was there a couple of days, anyhow.”

LIV.

Said Court erred in overruling the objection of said defendant to the following question addressed to the witness Albert J. Reed on cross-examination, as set forth in said defendant's bill of exceptions, Exception Number 38, as follows:

“Q. And when were you next there, if you remember?”

Said objection was based upon the ground that said question was not proper cross-examination.

Said Court overruled said objection, to which ruling said defendant then and there duly excepted, and now assigns said ruling as error. Thereupon the witness testified as follows:

“A. June 25th to July 7th.”

LV.

Said Court erred in overruling the objection of said defendant to the following question addressed to the witness Albert J. Reed on cross-examination, as set forth in said defendant's bill of exceptions, Exception Number 39, as follows:

“Q. What was the occasion of your being there that time?”

Said objection was based upon the ground that said question was not proper cross-examination.

[375]

Said Court overruled said objection, to which ruling said defendant then and there duly excepted, and

now assigns said ruling as error. Thereupon the witness testified as follows:

“A. Skinner stopped his machine and I was sent for to restart it.”

LVI.

Said Court erred in receiving in evidence and in refusing to strike out the following answer given by said witness Albert J. Reed to the question:

“Q. What was the occasion of your being there at that time,” addressed to said witness on cross-examination, as set forth in said defendant’s bill of exceptions, Exceptions Numbered 39 and 40 as follows:

“A. Skinner stopped his machine and I was sent for to restart it.”

Said motion to strike out was then and there denied by said Court, to which ruling said defendant then and there duly excepted, and now assigns said ruling as error.

LVII.

Said Court erred in overruling the objection of said defendant to the following question addressed to the witness Albert J. Reed on cross-examination, as set forth in said defendant’s bill of exceptions, Exception Number 41, as follows:

“Q. You say you were sent to Skinner’s place —by whom were you sent?”

Said objection was based upon the ground that said question was not proper cross-examination.

Said Court overruled said objection, to which ruling [376] said defendant then and there duly excepted, and now assigns said ruling as error. There-

upon the witness testified as follows:

“A. The Sharples Separator Company.”

LVIII.

Said Court erred in overruling the objection of said defendant to the following question addressed to the witness Albert J. Reed on cross-examination, as set forth in said defendant's bill of exceptions, Exception Number 42, as follows:

“Q. When next were you there?”

Said objection was based upon the ground that said question was not proper cross-examination.

Said Court overruled said objection, to which ruling said defendant then and there duly excepted, and now assigns said ruling as error. Thereupon the witness testified as follows:

“A. October 20th to December 20th.”

LIX.

Said Court erred in overruling the objection of said defendant to the following question addressed to the witness Albert J. Reed on cross-examination, as set forth in said defendant's bill of exceptions, Exception Number 43, as follows:

“Q. What was the occasion of your being there at that time?”

Said objection was based upon the ground that said question was not proper cross-examination.

Said Court overruled said objection, to which ruling said defendant then and there duly excepted, and now assigns [377] said ruling as error. Thereupon the witness testified as follows:

“A. To take charge of the mechanical milker.

I was working at that time for the Sharples

Separator Company. While there on the Skinner ranch at that time I operated the milker.”

LX.

Said Court erred in receiving in evidence, over the objection of said defendant that the same was not proper cross-examination, the following portion of the testimony of said witness Albert J. Reed as given on cross-examination, as set forth in said defendant's bill of exceptions, Exception Number 44, as follows:

“A. To take charge of the mechanical milker.

I was working at that time for the Sharples Separator Company. While there on the Skinner ranch at that time, I operated the milker.”

Said Court overruled said objection of said defendant, to which ruling said defendant then and there duly excepted, and now assigns the same as error.

LXI.

Said Court erred in receiving in evidence, over the objection of said defendant that the same was not proper cross-examination, the following portion of the testimony of said witness Albert J. Reed as given on cross-examination, as set forth in said defendant's bill of exceptions, Exception Number 45, as follows:

“The WITNESS. — (Continuing.) Cows were milked by hand when I went there on my second visit; there were two or three that had swollen quarters, that were being milked by hand. On my third visit, some half-dozen cows, perhaps, [378] were being milked by hand.

When I got there in June they were all being milked by hand. They had quit using the milker and I started it again."

Said Court overruled said objection of said defendant, to which ruling said defendant then and there duly excepted, and now assigns the same as error.

LXII.

Said Court erred in overruling the objection of said defendant to the following question addressed to the witness Albert J. Reed on cross-examination, as set forth in said defendant's bill of exceptions, Exception Number 46, as follows:

"Q. After that, were any of the cows taken off for any reason and milked by hand?"

Said objection was based upon the ground that said question was not proper cross-examination.

Said Court overruled said objection, to which ruling said defendant then and there duly excepted, and now assigns said ruling as error. Thereupon the witness testified as follows:

"A. Some dozen or so were taken off and milked by hand, and six or eight were isolated. I was in charge at that time, and this was done under my instruction."

LXIII.

Said Court erred in overruling the objection of said defendant to the following question addressed to the witness Albert J. Reed on cross-examination, as set forth in said defendant's bill of exceptions, Exception Number 47, as follows:

"Q. For what reason?" [379]

Said objection was based upon the grounds, that it is not proper cross-examination, and is asking for the opinion and conjecture of the witness, and not for a statement of fact.

Said Court overruled said objection, to which ruling said defendant then and there duly excepted, and now assigns said ruling as error. Thereupon the witness testified as follows:

“A. The condition of the cows warranted it.”

LXIV.

Said Court erred in receiving in evidence and in refusing to strike out the answer of the witness Albert J. Reed to the question, “Q. For what reason,” addressed to said witness on cross-examination as set forth in said defendant’s bill of exceptions, Exception Numbered 47 and 48, as follows:

“A. The condition of the cows warranted it.”

Said motion to strike out was made upon the ground that said answer of said witness to said question was not responsive.

Said Court denied said motion, to which ruling said defendant then and there duly excepted, and now assigns said ruling as error.

LXV.

Said Court erred in overruling the objection of said defendant to the following question addressed to the witness Albert J. Reed on cross-examination, as set forth in said defendant’s bill of exceptions, Exception Number 49, as follows:

“Q. What was the condition of the cows?”

[380]

Said objection was based upon the grounds that

said question was incompetent, irrelevant and immaterial, not proper cross-examination, and asking for the opinion and conjecture of the witness, and not a statement of fact.

Said Court overruled said objection, to which ruling said defendant then and there duly excepted, and now assigns said ruling as error. Thereupon the witness testified as follows:

“A. The whole udder was swollen, there was high fever and individual cows were in very bad condition.”

LXVI.

Said Court erred in overruling the objection of said defendant to the following question addressed to the witness Albert J. Reed, on cross-examination, as set forth in said defendant's bill of exceptions, Exception Number 50, as follows:

“Q. How soon did this condition appear after you had started the milker upon them?”

Said objection was based upon the ground that said question was not proper cross-examination.

Said Court overruled said objection, to which ruling said defendant then and there duly excepted, and now assigns said ruling as error. Thereupon the witness testified as follows:

“A. Directly.”

LXVII.

Said Court erred in overruling the objection of said defendant to the following question addressed to the witness Albert J. Reed on cross-examination, as set forth in said [381] defendant's bill of exceptions, Exception Number 51, as follows:

“Q. After you started the milker on that string of 30, were any taken off and milked by hand?”

Said objection was based upon the ground that said question was not proper cross-examination.

Said Court overruled said objection, to which ruling said defendant then and there duly excepted, and now assigns said ruling as error. Thereupon the witness testified as follows:

“A. Some two or three during the first two weeks, and then one or two as warranted, later on.”

LXVIII.

Said Court erred in overruling the objection of said defendant to the following question addressed to the witness Albert J. Reed on cross-examination, as set forth in said defendant's bill of exceptions, Exception Number 52, as follows:

“Q. Why was the milker taken off these cows?”

Said objection was based upon the grounds that said question was not proper cross-examination, not having been brought out in a direct examination, and calling for the conjecture of the witness, and not for a statement of facts.

Said Court overruled said objection, to which ruling said defendant then and there duly excepted, and now assigns said ruling as error. Thereupon the witness testified as follows:

“A. Owing to swollen quarters.”

LXIX.

Said Court erred in overruling the objection of

[382] said defendant to the following question addressed to the witness Albert J. Reed on cross-examination, as set forth in said defendant's bill of exceptions, Exception Number 53, as follows:

"Q. I will ask you if Skinner was getting as much milk in quantity in December when you quit, as he was in February, when the milking machine was started on these cows, from those on which the milking machine had been used?"

Said objection was based upon the ground that said question was not proper cross-examination.

Said Court overruled said objection, to which ruling said defendant then and there duly excepted, and now assigns said ruling as error. Thereupon the witness testified as follows:

"A. In my opinion he was not."

LXX.

Said Court erred in receiving in evidence and in refusing to strike out the answer of said witness Albert J. Reed to the question: "I will ask you if Skinner was getting as much milk in quantity in December, when you quit, as he was in February, when the milking machine was started on these cows, from those on which the milking machine had been used," addressed to said witness on cross-examination, as set forth in said defendant's bill of exceptions, Exceptions Numbered 53 and 54, as follows:

"A. In my opinion, he was not."

Said motion to strike out was based upon the ground that said answer was not responsive, and was not based upon a statement of facts.

Said Court denied said motion, to which ruling said [383] defendant then and there duly excepted, and now assigns said ruling as error.

LXXI.

Said Court erred in overruling the objection of said defendant to the following question addressed to the witness Albert J. Reed on cross-examination, as set forth in said defendant's bill of exceptions, Exception Number 55, as follows:

“Q. And some quit giving milk in one quarter, and some in more quarters?”

Said objection was based upon the ground that said question was not proper cross-examination.

Said Court overruled said objection, to which ruling said defendant then and there duly excepted, and now assigns said ruling as error. Thereupon the witness testified as follows:

“A. Yes.”

LXXII.

Said Court erred in granting the motion of said plaintiff to strike out from the cross-examination of the witness Frederick A. Frank, the following language as set forth in said defendant's bill of exceptions, Exception Number 56, as follows:

“And I believe that Reed notified Skinner of this fact, too.”

To said ruling of said Court striking out said passage from said cross-examination of said witness, said defendant then and there duly excepted, and now assigns said ruling as error. [384]

LXXIII.

Said Court erred in receiving in evidence, and in

refusing to strike out from the direct examination of the witness, C. F. Boarts, as set forth in said defendant's bill of exceptions, Exception Number 57, the following language:

"He had a very good dairy house."

Said motion was made upon the ground that said answer of said witness was a conclusion of the witness.

Said Court denied said motion, to which ruling said defendant then and there duly excepted, and now assigns said ruling as error.

LXXIV.

Said Court erred in sustaining plaintiff's objection to H. D. Nye's testimony, as set forth in defendant's bill of exceptions, Exception Number 58, as follows:

"Q. Is it not a fact, Mr. Nye, that dairy conditions in the Imperial Valley during the year 1914, or during the time when you were State dairy inspector down there, were such that milk and dairy products were not permitted to be shipped from Imperial Valley into Los Angeles city for consumption?

Mr. SWING.—Objected to as incompetent, irrelevant and immaterial, and not proper cross-examination

The COURT.—Objection sustained.

Mr. PARKE.—Note an exception."

The said defendant, said Sharples Separator Company, a corporation, assigns said ruling as error. The following is the substance of the evidence rejected:

The WITNESS.—"Yes, sir." [385]

LXXV.

Said Court erred in receiving in evidence and in refusing to strike out from the cross-examination of Dr. V. E. Cram, as set forth in said defendant's bill of exceptions, Exception Number 59, the following passage:

"I found pus in the teats of the cows; that indicates the presence of a germ. There are not two or three kinds of germs—noninfectious and infectious germs. The presence of pus indicates the presence of a germ; this germ was not an infectious germ; it is not a contagious germ. I did not make any bacteriological test of the germs from Skinner's cows. As to whether they were not staphylococci, streptococci or micrococci, which by the better authorities are held to be infectious. I presumed it was staphylococcus; I presumed it was; my opinion is a presumption, and I made no bacteriological or chemical analysis."

Said motion was based upon the ground that the answers of said witness as to causes were incompetent, as they appear as mere presumptions on his part.

Said Court denied said motion, to which ruling said defendant then and there duly excepted, and now assigns said ruling as error.

LXXVI.

The Court erred in overruling defendant's objection to plaintiff's testimony as set forth in defendant's bill of exceptions, Exception Number 60, as follows:

“Q. Doctor, assuming that a herd of dairy cows were being milked, one string by a Sharples mechanical milker, and another string by hand, and that the only cases of swollen quarters to appear in the herd appeared among the cows milked [386] by the mechanical milker, and that when the condition so appeared the affected cows were taken off the milker and milked together with other cows, then being milked by hand, not being isolated, and that the milkers did not wash their hands between cows, that the cows milked by hand got well, and the swollen quarters did not spread to a single other cow being milked by hand. What would you say as to what was the cause of the swollen quarters?

Mr. PARKE.—We object to the question as assuming only a partial statement by the uncontradicted facts as presented by the evidence, it appearing clearly from the evidence that there was present in the milk from Skinner’s cows certain germs designated as staphylococci, and it would be unfair to ask the witness the cause of such condition, without setting forth that condition. And, further, nothing is said about the manner in which the milking machine was operated.

The COURT.—Well, I overrule the objection.

Mr. PARKE.—Note an exception.”

And said defendant, said Sharples Separator Company, a corporation, now assigns said ruling as error. Thereupon the witness testified as follows:

“A. I would believe the teats there were being bruised by the milker. I would not say, under

the conditions stated in the question, that the swollen quarter was an infectious condition. I think that the cup on this teat has bruised the quarter. The reason I think so was because there was no spreading of the disease there originally, and as soon as they took the teat cup off and went to milking these cows by hand, why, the trouble disappeared. The primary cause, [387] in my opinion, of the condition stated was the bruising of the teat cup—or the teat by the teat cup.”

LXXVII.

Said Court erred in overruling the objection of said defendant to the following question addressed on direct examination to the witness A. G. McCulloch, as set forth in said defendant's bill of exceptions, Exception Number 61, as follows:

“Q. What are some of the causes of mammitis, if you can say?”

Said objection was based upon the ground that said question called for an expert opinion of the witness, no foundation having been laid therefor.

Said Court overruled said objection, to which ruling said defendant then and there duly excepted, and now assigns said ruling as error. Thereupon the witness testified as follows:

“A. Any injury inflicted upon the cow's udder will cause an inflammation. I know the general difference between infectious mammitis and non-infectious mammitis.”

LXXVIII.

Said Court erred in overruling the objection of said

defendant to the following question addressed to said witness A. G. McCulloch, on direct examination, as set forth in said defendant's bill of exceptions, Exception Number 62, as follows:

"Q. I will ask you whether, in your opinion, noninfections mammitis can be caused by the use of a Sharples Mechanical Milker in milking cows."

Said question was objected to as calling for a conclusion, [388] no proper foundation having been laid, and as incompetent, irrelevant and immaterial, and because the circumstances and conditions under which the operation of the machine might be made were not stated in the question.

Said Court overruled said objection, to which ruling said defendant then and there duly excepted, and now assigns said ruling as error. Thereupon the witness testified as follows:

"A. It can."

LXXIX.

Said Court erred in overruling the objection of said defendant to the following question addressed on direct examination to said witness A. G. McCulloch, as set forth in said defendant's bill of exceptions, Exception Number 63, as follows:

"Q. Did you follow them in operating the milker?"

Said objection was based upon the ground that said question called for a conclusion of the witness.

Said Court overruled said objection, to which ruling said defendant then and there duly excepted, and

now assigns said ruling as error. Thereupon the witness testified as follows:

“A. I did.”

LXXX.

Said Court erred in overruling defendant's objection to plaintiff's testimony, as set forth in defendant's bill of exceptions, Exception Number 64, as follows:

“Q. I will ask you whether, in your opinion, the Sharples mechanical milker can be operated upon dairy cows in the Imperial Valley without seriously injuring some of [389] them?

Mr. PARKE.—We object to the question as calling for an expert opinion of the witness, no foundation having been laid, incompetent, irrelevant and immaterial, and presuming a state of facts not proven in this case at issue.

The COURT.—The objection is overruled.

Mr. PARKE.—We note an exception.”

And said defendant, said Sharples Separator Company, now assigns said ruling as error. Thereupon the said witness testified as follows:

“A. No, it cannot.”

LXXXI.

Said Court erred in overruling defendant's objection to plaintiff's testimony, as set forth in defendant's bill of exceptions, Exception Number 65, as follows:

“Q. What, in your opinion, would be the effect upon a string of dairy cows, if milked any considerable length of time with a Sharples mechanical milker, even though all the instructions

furnished by the company were strictly followed?

Mr. PARKE.—We object to the question as calling for an expert opinion of the witness, presuming a state of facts not proven in this case, and incompetent, irrelevant and immaterial.

The COURT.—The objection is overruled.

Mr. PARKE.—We note an exception.”

And said defendant, said Sharples Separator Company, a corporation, now assigns said ruling as error. Thereupon said witness testified as follows:

“A. It would eventually kill the cows if persisted in. [390] It would develop an inflammation, and the inflammation would only be increased and aggravated by the use of the machine, if persisted in.”

LXXXII.

Said Court erred in refusing to give to the jury the Instruction No. II as requested by the defendant and as set forth in defendant's bill of exceptions, Exception Number 66, as follows:

“If you believe from all the evidence that the plaintiff's cows were injured by the use of the milking machine furnished by the defendant, Sharples Separator Company while being operated in strict accordance with the instructions given to the plaintiff by the defendant, then you are instructed that the full measure of plaintiff's damage is the difference between the value of the cows before they were injured, and the value immediately after such injury resulted, and if such damage be allowed plaintiff is not entitled to

recover anything additional for care or keep of said cows, or for loss of butter fat therefrom.”

Which said Instruction No. II said Court then and there refused to give to said jury, and in failing so to instruct and charge said jury, said Court misdirected said jury; and to said ruling of said Court, refusing to give said instruction to said jury, the said defendant, in the presence of said jury and before it retired to consider its verdict, then and there duly excepted and now assigns said ruling as error. [391]

LXXXIII.

Said Court erred in refusing to give to the jury instruction No. III as requested by defendant and as set forth in defendant's bill of exceptions, Exception Number 67, as follows:

“You are instructed that the plaintiff is not entitled to any claim for damages for loss of butter fat.”

Which said Instruction No. III, said Court then and there refused to give to said jury, and in failing so to instruct and charge said jury, said Court misdirected said jury; and to said ruling of said Court, refusing to give said instruction to said jury, the said defendant, in the presence of said jury and before it retired to consider its verdict, then and there duly excepted and now assigns said ruling as error.

LXXXIV.

Said Court erred in refusing to give to the jury instruction No. IV as requested by defendant and as set forth in defendant's bill of exceptions, Exception No. 68, as follows:

“There is no evidence before the Court as to the value of the pasturage claimed by plaintiff, and plaintiff cannot recover therefor.”

Which said instruction No. IV said Court then and there refused to give to said jury, and in failing so to instruct and charge said jury, said Court misdirected said jury; and to said ruling of said Court, refusing to give said instruction to said jury, the said defendant, in the [392] presence of said jury and before it retired to consider its verdict, then and there duly excepted and now assigns said ruling as error.

LXXXV.

Said Court erred in refusing to give to the jury Instruction No. VII as requested by defendant and as set forth in defendant's bill of exceptions, Exception No. 69, as follows:

“If, from all the evidence, you believe that the plaintiff's cows had infectious mammitis, or any other infectious disease of the udder, and that such disease contributed to, or caused any part, or all, of the injury to the cows claimed to have been injured, then you are instructed that the defendant, Sharples Separator Company, cannot be held liable in damages to the plaintiff for such injury resulting from such diseased condition.”

Which said instruction No. VII, said Court then and there refused to give to said jury, and in failing so to instruct and charge said jury, said Court misdirected *said instruction* to said jury, the said defendant, in the presence of said jury and before it retired to consider its verdict, then and there duly excepted and now assigns said ruling as error.

LXXXVI.

Said Court erred in refusing to give to the jury Instruction No. IX as requested by defendant and as set forth in defendant's bill of exceptions, Exception No. 70, as follows: [393]

"If you believe, from all the evidence, that plaintiff's cows had infectious mammitis, or other disease of the udder, and that with knowledge of the diseased condition the plaintiff used, or permitted the milking machine purchased from defendant Sharples Separator Company to be used upon the cows so diseased, you are instructed that the defendant Sharples Separator Company is not liable for the injury resulting from the use of the machine upon cows so diseased."

Which said Instruction No. IX, said Court then and there refused to give to said jury, and in failing so to instruct and charge said jury, said Court misdirected said jury; and to said ruling of said Court, refusing to give said instruction to said jury, the said defendant, in the presence of said jury and before it retired to consider its verdict, then and there duly excepted and now assigns said ruling as error.

LXXXVII.

Said Court erred in refusing to give to the jury Instruction No. XI, as requested by defendant and as set forth in defendant's bill of exceptions, Exception Number 71, as follows:

"If you believe, from all the evidence, that the diseased condition of plaintiff's cows which

resulted in the injury complained of by him, was a traumatic, noninfectious disease of the udder, known as ordinary garget, and that the permanent injury [394] to plaintiff's cows as claimed by him resulted from a lack of proper care and treatment of said cows by the plaintiff, then you are instructed that the defendant Sharples Separator Company cannot be held responsible for any injury or damage which might have been prevented by the proper treatment of the injured cows by the plaintiff."

Which said Instruction No. XI, said Court then and there refused to give to said jury, and in failing so to instruct and charge said jury, said Court misdirected said jury; and in said ruling of said Court, refusing to give said instructions to said jury, the said defendant, in the presence of said jury and before it retired to consider its verdict, then and there duly excepted and now assigns said ruling as error.

LXXXVIII.

Said Court erred in refusing to give to the jury Instruction No. XII as requested by defendant and as set forth in defendant's bill of exceptions, Exception Number 72, as follows:

"You are instructed that your verdict in this case should be in favor of the defendant Sharples Separator Company."

Which said Instruction No. XII, said Court then and there refused to give to said jury, and in failing so to instruct and charge said jury, said Court misdirected said jury; and to said ruling of said Court, refusing to give said instruction to said jury,

the said defendant, in the presence of said jury and before it retired to consider its [395] verdict, then and there duly excepted and now assigns said ruling as error.

LXXIX.

Said Court erred in refusing to give to the jury Instruction No. XIV as requested by defendant and as set forth in defendant's bill of exceptions, Exception Number 73, as follows:

"If you believe, from all the evidence, that any part or all of the damage to plaintiff's cows, from whatever cause, resulted from a lack of prompt, proper and careful treatment of said cows by the plaintiff, then you are instructed that for all such resulting damage the defendant, Sharples Separator Company, is not liable."

Which said Instruction No. XIV, said Court then and there refused to give to said jury, and in failing so to instruct and charge said jury, said Court misdirected said jury; and to said ruling of said Court, refusing to give said instruction to said jury, the said defendant, in the presence of said jury and before it retired to consider its verdict, then and there duly excepted and now assigns said ruling as error.

XC.

Said Court erred in refusing to give to the jury Instruction No. XV, as requested by defendant and as set forth in defendant's bill of exceptions, Exception Number 74, as follows:

"If you believe, from all the evidence, that the death of the three cows, and the [396] diseased condition of the udders of the other

twenty-four cows, resulted from the invasion into the udders of these cows of an infectious disease, then the defendant in this case is not liable to the plaintiff for such damage.”

Which said instruction No. XV, said Court then and there refused to give to said jury, and in failing so to instruct and charge said jury, said Court misdirected said jury; and to said ruling of said Court, refusing to give said instruction to said jury, the said defendant, in the presence of said jury and before it retired to consider its verdict, then and there duly excepted and now assigns said ruling as error.

XCI.

Said Court erred in refusing to give to the jury Instruction No. XVI, as requested by defendant and as set forth in defendant’s bill of exceptions, Exception Number 75, as follows:

“If you believe, from all the evidence, that the diseased condition of plaintiff’s cows resulted from the negligent or improper use by him of the milking machine purchased from the defendant, then you are instructed that the defendant Sharples Separator Company is not liable for such damage.”

Which said Instruction No. XVI, said Court then and there refused to give to said jury, and in failing so to instruct and charge said jury, said Court misdirected [397] said jury; and to said ruling of said Court, refusing to give said instruction to said jury, the said defendant, in the presence of said jury and before it retired to consider its verdict, then and

there duly excepted and now assigns said ruling as error.

XCII.

Said Court erred in giving the following instruction to the jury as set forth in defendant's bill of exceptions, Exception Number 76, as follows:

“This is an action brought by plaintiff to recover damages for injuries and losses suffered by him as a result of the operation of a Sharples mechanical milker upon his herd of dairy cows. Plaintiff alleges that defendant sold him a Sharples mechanical milker and warranted the same to be fit and proper for milking plaintiff's dairy cows and represented that if the same was operated according to its instructions it would not injure his cows or decrease the amount of milk received from them. Plaintiff further alleges that said mechanical milker was operated according to the instruction furnished by the Sharples Separator Company, but that it both seriously injured his cows and decreased the amount of milk given by them. These allegations are denied by the defendants and it is for you to decide whether or not they are true. If you find from this evidence that they are true, it is your duty to return a verdict for the plaintiff for such damages as it is shown plaintiff has sustained, as alleged in [398] the complaint, and under the rule of damages which I give you for assessing damages; and I might say here to you, gentlemen, that while Edgar Brothers was sued in this complaint they are no more a party

to this action, because as to them the action was dismissed.”

And said defendant, in the presence of said jury and before it retired to consider its verdict, then and there duly excepted to said instruction and now assigns as error the giving of said instruction to said jury by said Court.

XCIII.

The Court erred in giving the following instruction to the jury as set forth in defendant's bill of exceptions, Exception Number 77, as follows:

“The evidence in this case shows that plaintiff operated the milker which he purchased from defendant or permitted the same to be operated on all or some of his cows from about February 7, 1914, to July 7, 1914, and again from October 20th, 1914, to December 20th, 1914. Plaintiff claims that within about a month after the milker was started his cows began suffering from the effects of its operation and that his cows were injured as long as the milker was operated.

“If you find from the evidence that the plaintiff's cows were so injured by the operation of said milker you are to allow his damages in the sum which would be a fair compensation for the loss incurred by an effort in good faith to use the [399] machine for milking plaintiff's cows. In considering plaintiff's good faith in continuing the use of the milker and permitting it to be started again after it had once been stopped, you are to consider all the circumstances surrounding the operation of the milker,

including the representations made by the defendant company and its employees.

“The word ‘fair’ used in this instruction to describe the compensation to which plaintiff may be entitled is not used by me to mean something less than ‘full’ or ‘complete’ compensation; it is used rather in the sense of ‘just.’ ”

And the defendant, in the presence of said jury and before it retired to consider its verdict, then and there duly excepted to said instruction and now assigns as error the giving of said instruction to said jury by said Court.

XCIV.

Said Court erred in giving the following instruction to the jury as set forth in defendant’s bill of exceptions, Exception Number 78, as follows:

“The jury are instructed at the time the Sharples Separator Company sold the mechanical milker to plaintiff, the said the Sharples Separator Company guaranteed the machine to be in all respects as represented in its printed matter and to be capable of doing the work claimed therein. Plaintiff has offered in evidence a number of printed documents which he says were delivered to him by the Sharples Separator Company during the [400] negotiations leading up to the sale to him of the Sharples mechanical milker. These contained various statements regarding the Sharples Mechanical Milker, and what it will do, and it is for you to decide from all the evidence whether the warranty has been performed.”

And said defendant, in the presence of said jury and before it retired to consider its verdict, then and there duly excepted to said instruction and now assigns as error the giving of said instruction to said jury by said Court.

XCIV.

Said Court erred in giving the following instruction to the jury as set forth in defendant's bill of exceptions, Exception Number 79, as follows:

"You are instructed that the only warranty given to the plaintiff by the defendant Sharples Separator Company which is to be considered by you is the warranty contained in the original order, being Plaintiff's Exhibit 1, introduced in evidence; and you can take that with you to the jury-room, gentlemen, or any other exhibit you desire.

"You are instructed that, under the law of California, a detriment caused by the breach of a warranty of the quality of personal property is deemed to be the excess, if any, of the value which the property would have had at the time to which the warranty referred, if it had been complied with, over its actual value at that [401] time.

"Also that the detriment caused by the breach of warranty of the fitness of an article of personal property for a particular purpose is deemed to be that which I have just specified, together with a fair compensation for the loss incurred by an effort in good faith to use it for such purpose."

And said defendant, in the presence of said jury and before it retired to consider its verdict, then and there duly excepted to said instruction and now assigns as error the giving of said instruction to said jury by said Court.

XCVI.

Said Court erred in giving the following instruction to the jury as set forth in defendant's bill of exceptions, Exception Number 80, as follows:

"The jury are instructed that if you find from the evidence that there was a warranty that the Sharples mechanical milker sold plaintiff would milk his cows without injury and you also find that the warranty was broken, you should allow plaintiff damages for all injuries which are the approximate result of the operation of said milker upon said cows while the machine was being operated by plaintiff or his help in conformity with instructions furnished by the defendant company, and also damages for all injury done by the milker while being operated by the employee or agent of the defendant company, if you find any time it was so operated by an employee or agent of the [402] defendant company."

And said defendant, in the presence of said jury and before it retired to consider its verdict, then and there duly excepted to said instruction and now assigns as error the giving of said instruction to said jury by said Court.

XCVII.

Said Court erred in giving the following instruc-

tion to the jury as set forth in defendant's bill of exceptions, Exception Number 81, as follows:

"If you believe from all the evidence that plaintiff's cows were injured by the use of the milking machine furnished by the defendant, while being operated in strict accordance with the instructions given to the plaintiff by the defendant, or while being operated by the defendant, upon the plaintiff's cows, then the plaintiff is entitled to recover such damages as are shown by the evidence to have been the proximate result of injuries caused by said machine."

And said defendant, in the presence of said jury and before it retired to consider its verdict, then and there duly excepted to said instruction and now assigns as error the giving of said instruction to said jury by said Court.

XCVIII.

Said Court erred in giving the following instruction to the jury as set forth in defendant's bill of exceptions, Exception Number 82, as follows:

"In estimating the value of the cows [403] that were injured the true measure of such damage is the value of said cows before they were injured and the value after such injury resulted. And in speaking of value, gentlemen, I am speaking of the market value of the cows."

And said defendant, in the presence of said jury and before it retired to consider its verdict, then and there duly excepted to said instructions and now assigns as error the giving of said instruction to said jury by said Court.

XCIX.

Said Court erred in giving the following instruction to the jury as set forth in defendant's bill of exceptions, Exception Number 83, as follows:

"You must not allow a duplication of damages. That is to say, you must not allow for the value of the cow and also for the value of the butter fat that she might have given after his loss, and I give you these rules to govern you in allowing the damages:

"1st: Where a cow died, you shall allow for the use of the cow, that is to say, for the loss of the butter fat which the plaintiff sustained by reason of the injury to the cow until the time of her death; then allow for the value of the cow if she had not been injured.

"2d: Where a cow was permanently injured and destroyed as a milk cow, you shall allow for the loss of the butter fat from the time she was injured for a reasonable length of time to determine that the cow would be of no [404] further service as a milk cow and until she was well enough to be disposed of for beef; then allow the difference between the value of the cow before she was injured and the value of the cow for beef.

"3d: Where a cow was not destroyed as a milk cow, but permanently injured, you shall allow for loss of butter fat during the time she was injured so that she gave a less quantity of milk, then consider the amount of damage that was done to the cow, that is to say, the value of the

cow before her injury, and the value of the cow as a milk cow after her injury.

“4th: Where a cow was not permanently injured, but was only injured for a time, you shall allow for loss of butter fat during the time she was injured and did not give her normal amount of milk.

“5th: If the machine did not produce as much milk when being used as if said cows had been milked by hand, and there was in consequence a loss of butter fat, you can take that into consideration and allow for such loss of butter fat.

“In determining the loss of the use of the cow that is shown by the loss of butter fat, you should take into consideration the expense of keeping the cow, and not allow expense of pasturage and also loss of use of cows.”

Said defendant, in the presence of said jury and before it retired to consider its verdict, then and there [405] duly excepted to said instruction and now assigns as error the giving of said instruction to said jury by said Court.

C.

Said Court erred in permitting to be rendered and in receiving the verdict of the jury in the above-entitled action; and to said verdict, and to the action of said Court in permitting to be rendered and in receiving said verdict, said defendant then and there, upon the announcement of said verdict duly excepted, and now assigns said verdict and the action of said Court thereon as error.

CI.

Said Court erred in giving, making, rendering, entering and filing its judgment in the above-entitled action in favor of the above-named plaintiff and against the above-named defendant.

CII.

Said Court erred in not giving, making, rendering, entering and filing its final judgment in the above-entitled action in favor of the above-named defendant and against the above-named plaintiff.

CIII.

Said Court erred in giving making, rendering, entering and filing its final judgment in the above-entitled action in favor of said plaintiff and against said defendant upon the pleadings and record in said action.

CIV.

Said Court erred in giving, making, rendering, entering, and filing its final judgment in said action in favor of said plaintiff and against said defendant, in this, that said final judgment was and is contrary to law and to the [406] cause made and facts stated in the pleadings and record in said action.

In order that the foregoing assignments of errors may appear of record, said defendant presents the same to said Court, and prays that such disposition be made thereof as is in accordance with law and the Statutes of the United States in such cases made and provided; and said defendant, plaintiff in error herein, prays the reversal of the above-mentioned final judgment heretofore given, made, rendered, entered

and filed in the above-entitled court, in the above-entitled action.

Dated Los Angeles, California, A. D. 1917, February 13th.

THE SHARPLES SEPARATOR COMPANY, a Corporation.

Said Defendant, and Plaintiff in Error Herein.

By WILLARD P. SMITH,
BICKSLER, SMITH & PARKE,
J. J. DUNNE,

Its Attorneys.

United States of America,
Southern District of California,—ss.

We, the undersigned, attorneys for the above-named defendant, plaintiff in error herein, do hereby certify that the foregoing assignments of errors is made on behalf of said defendant, plaintiff in error herein, and is [407] in our opinion well taken, and the same now constitutes the assignments of error upon the writ prayed for.

Dated Los Angeles, California, this 13th day of February, A. D. 1917.

WILLARD P. SMITH,
BICKSLER, SMITH & PARKE,
J. J. DUNNE,

Attorneys for said Defendant, and Plaintiff in Error Herein.

Received a copy of the foregoing Assignments of Errors this 17 day of February, A. D. 1917.

PHIL D. SWING,
Attorney for the Above-named Plaintiff, and Defendant in Error Herein.

[Endorsed]: Original. No. 413—Civil. In the United States District Court, in and for the Southern District of California, Southern Division. W. W. Skinner, Plaintiff, vs. The Sharples Separator Company, a Corporation, Defendant. Assignment of Errors. Filed Feb. 23, 1917. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. Willard P. Smith, Bicksler, Smith & Parke, 829 Citizens Natl. Bank Bldg., Fifth & Spring Sts., Los Angeles, Cal., Telephones: A-2752, Main 5166, J. J. Dunne, Attorneys for Defendant. [408]

In the District Court of the United States, in and for the Southern District of California, Southern Division.

No. 413—CIVIL.

W. W. SKINNER,

Plaintiff,

vs.

THE SHARPLES SEPARATOR COMPANY, a Corporation,

Defendant.

Order Allowing Writ of Error.

At a stated term, to wit, the January Term. A. D. 1917, of the above-entitled court, held at its court-room at the city of Los Angeles, in the State of California, on the 26th day of February, A. D. 1917.

Present: The Honorable OSCAR A. TRIPPET, Judge of Said Court.

Upon the petition of The Sharples Separator Company, a corporation, and on motion of its counsel:

It is hereby ordered that a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit at the city and county of San Francisco, State of California, from the final judgment heretofore given, made, filed and entered in and by the above-named court, in the above-entitled cause, upon the issues therein joined, under date of October 13th, A. D. 1916, be, and the same is hereby allowed; and that a certified transcript of the record, testimony, exhibits, stipulations, bill of exceptions, and all proceedings herein, be forthwith transmitted to said [409] United States Circuit Court of Appeals, for the Ninth Circuit. It is further ordered that upon the filing by the defendant and plaintiff in error of a good and sufficient bond on writ of error, approved by this Court, in the sum of Five Thousand Dollars, all further proceedings in this court be suspended and stayed until the determination of said Writ of Error by the United States Circuit Court of Appeals for the Ninth Circuit.

Dated Los Angeles, California, 2/27, A. D. 1917.

OSCAR A. TRIPPET,

Judge of said Court.

[Endorsed]: No. 413—Civil. In the United States District Court, in and for the Southern District of California, Southern Division. W. W. Skinner, Plaintiff, vs. The Sharples Separator Company, a Corporation, Defendant. Order Allowing Writ of Error. Filed Feb. 27, 1917. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Willard P. Smith, Bicksler, Smith & Parke, 829 Citizens Natl. Bank Bldg., Fifth & Spring Sts., Los Angeles,

Cal., Telephones: A-2762, Main 5166, J. J. Dunne,
Attorneys for Defendant. [410]

*In the District Court of the United States, in and for
the Southern District of California, Southern
Division.*

No. 413—CIVIL.

W. W. SKINNER,

Plaintiff,

vs.

THE SHARPLES SEPARATOR COMPANY, a
Corporation,

Defendant.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS:

That we, The Sharples Separator Company, a corporation, as principal, and United States Fidelity & Guaranty Company, a corporation, as surety, are held and firmly bound unto the defendant in error, W. W. Skinner, in the full and just sum of Five Thousand Dollars (\$5,000), to be paid to said defendant in error, his certain attorneys, executors, administrators and assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators and successors jointly and severally by these presents. Sealed with our seals and dated this 15 day of February, A. D. 1917.

WHEREAS, lately at a District Court of the United States, in *and Ninth* Judicial Circuit, in and for the Southern District of California, Southern Division, in [411] a suit depending in said court

between W. W. Skinner, as plaintiff, and The Sharples Separator Company, a corporation, as defendant, a judgment was rendered against said defendant, and said defendant having obtained a writ of error and filed a copy thereof in the Clerk's office of said court, to reverse the judgment in the aforesaid suit, and a citation directed to said plaintiff, citing and admonishing him to be and appear at a session of the United States Circuit Court of Appeals, for the Ninth Circuit, to be holden in the city and county of San Francisco, State of California, in said Circuit, on the 26th day of March, A. D. 1917:

Now, the condition of the above obligation is such that if the said defendant shall prosecute said writ of error to effect and answer all damages and costs if it fail to make the said plea good, then the above obligation to be void; else, to remain in full force and virtue.

THE SHARPLES SEPARATOR COM-
PANY, a Corporation.

By W. J. WOLFORD,
Its Manager.

UNITED STATES FIDELITY & GUAR-
ANTY COMPANY.

[Seal] By W. H. SCHRODER,
Its Attorney in Fact. [412]

State of California,
City and County of San Francisco,—ss.

On this 15th day of February, in the year one thousand nine hundred and seventeen, before me, E. J. Casey, a notary public in and for said city and county, residing therein, duly commissioned and

sworn, personally appeared W. J. Wolford, known to me to be the manager of the Sharples Separator Company, the corporation described in and that executed the within instrument, and also known to me to be the person who executed in on behalf of the corporation therein named, and he acknowledged to me that such corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, at my office, in the city and county of San Francisco, the day and year last above written.

[Seal]

E. J. CASEY,

Notary Public in and for the City and County of San Francisco, State of California.

My commission expires August 18, 1919.

State of California,

County of Los Angeles,—ss.

On this 16th day of February, in the year one thousand nine hundred and 17, before me, J. St. Paul White, a notary public in and for said county and State, residing therein, duly commissioned and sworn, personally appeared W. H. Schroder, known to me to be the duly authorized attorney in fact of the United States Fidelity and Guaranty Company, and the same person whose name is subscribed to the within instrument as the attorney in fact of said company, and the said W. H. Schroder duly acknowledged to me that he subscribed the name of the United States Fidelity and Guaranty Company thereto as principal and his own name as attorney in fact. [413]

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Seal]

J. ST. PAUL WHITE,

Notary Public in and for Los Angeles County, State of California.

The foregoing bond is hereby approved.

OSCAR A. TRIPPET,

Judge.

_____,
_____,

Attorneys for said Plaintiff and Defendant in Error.

[Endorsed]: No. 413—Civil. In the United States District Court, in and for the Southern District of California, Southern Division. W. W. Skinner, Plaintiff, vs. The Sharples Separator Company, a Corporation, Defendant. Bond on Writ of Error. Filed Feb. 27, 1917. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Willard P. Smith, Bicksler, Smith & Parke, 829 Citizens Natl. Bank Bldg., Fifth & Spring Sts., Los Angeles, Cal., Telephones: A-2752, Main 5166, J. J. Dunne, Attorneys for Defendant. [414]

*In the District Court of the United States, in and for
the Southern District of California, Southern
Division.*

No. 413—CIVIL.

W. W. SKINNER,

Plaintiff,

vs.

THE SHARPLES SEPARATOR COMPANY, a
Corporation,

Defendant.

Praeipce for Transcript of Record.

To the Clerk of the Above-entitled Court:

Sir: You will please prepare transcript of record in the above-entitled cause to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Judicial Circuit under the writ of error heretofore issued out and perfected to said court, and include in said transcript the following pleadings, proceedings and papers on file, to wit:

1. Writ of Error.
2. Citation on Writ of Error and Acknowledgment of Service.
3. Amended Petition for Removal.
4. Bond on Removal.
5. Plaintiff's Original Complaint.
6. Plaintiff's Amended Complaint.
7. Plaintiff's Amendment to Amended Complaint.
8. Answer of Sharples Separator Company to Amended Complaint.
9. Amended Answer of Edgar Bros. Company.

10. Verdict. [415]
11. Judgment-roll and Certificate thereto.
12. Bill of Exceptions and Order Allowing Same.
13. Stipulation filed and order made on October 21st, 1916, extending time within which defendant might file Bill of Exceptions.
14. Stipulation filed and order entered on November 20, 1916, extending time with which defendant might file Bill of Exceptions.
15. Stipulation filed and order entered on December 23d, 1916, extending time within which defendant might prepare and file Bill of Exceptions.
16. Stipulation filed and order entered on January 26th, 1917, extending time for settling Bill of Exceptions.
17. Minute Order entered on January 26th, 1917, extending time for settling Bill of Exceptions.
18. Minute Order entered February 6, 1917, extending defendant's time to have Bill of Exceptions settled and allowed.
19. Objections by plaintiff to presentation, settlement and signing of Bill of Exceptions, filed on February 6th, 1917.
20. Petition for Writ of Error.
21. Assignments of Error.
22. Order Allowing Writ of Error and Supersedeas.
23. Bond on Writ of Error and Supersedeas.
24. This Praecipe.

Said transcript to be prepared as required by law and the rules of said Court, and the rules of the United States Circuit Court of Appeals for the Ninth

Circuit, and filed in the office of the clerk of the United States Circuit Court of [416] Appeals before the 26th day of March, A. D. 1917.

Dated Los Angeles, California, this 8th day of March, A. D. 1917.

THE SHARPLES SEPARATOR COM-
PANY, a Corporation,

Plaintiff in Error.

WILLARD P. SMITH,
BICKSLER, SMITH & PARKE,
J. J. DUNNE,

Attorneys for said Plaintiff in Error.

[Endorsed]: Original. No. 413—Civil. In the United States District Court, in and for the Southern District of California, Southern Division. W. W. Skinner, Plaintiff, vs. The Sharples Separator Company, a Corporation, Defendant. Praecipe. Filed Mar. 8, 1917. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. Willard P. Smith, Bicksler, Smith & Parke, 829 Citizens Natl. Bank Bldg., Fifth & Spring Sts., Los Angeles, Cal., Telephones: A-2752, Main 5166, J. J. Dunne, Attorneys for Defendant. [417]

*In the District Court of the United States of America,
in and for the Southern District of California,
Southern Division.*

No. 413—CIVIL.

W. W. SKINNER,

Plaintiff,

vs.

THE SHARPLES SEPARATOR COMPANY, a
Corporation,

Defendant.

**Certificate of Clerk U. S. District Court to Transcript
of Record.**

I, Wm. M. Van Dyke, clerk of the District Court of the United States of America, in and for the Southern District of California, do hereby certify the foregoing four hundred and seventeen typewritten pages, numbered from 1 to 417, inclusive, and comprised in one volume, to be a full, true and correct copy of the judgment-roll, stipulations and orders extending time to file bill of exceptions, objections by plaintiff to presentation, settlement and signing of bill of exceptions, bill of exceptions, petition for writ of error, assignments of errors, order allowing writ of error and supersedeas, bond on writ of error and supersedeas and praecipe for record on writ of error in the above and therein entitled cause, and that the same together constitute the record in said cause as specified in the said praecipe filed in my office on behalf of the plaintiff in error by its attorney of record.

I do further certify that the cost of the foregoing

record is \$222.25, the amount whereof has been paid me by [418] The Sharples Separator Company, a corporation, the plaintiff in error herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the District Court of the United States of America, in and for the Southern District of California, this 21st day of April, in the year of our Lord one thousand nine hundred and seventeen and of our Independence the one hundred and forty-first.

[Seal]

WM. M. VAN DYKE,

Clerk of the District Court of the United States of America, in and for the Southern District of California. [419]

[Endorsed]: No. 2978. United States Circuit Court of Appeals for the Ninth Circuit. The Sharples Separator Company, a Corporation, Plaintiff in Error, vs. W. W. Skinner, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Southern District of California, Southern Division.

Filed April 30, 1917.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

*United States Circuit Court of Appeals, for the
Ninth Circuit.*

**THE SHARPLES SEPARATOR COMPANY, a
Corporation,**

Plaintiff in Error,

vs.

W. W. SKINNER,

Defendant in Error.

**Order Extending Time to May 15, 1917, to File
Record and Docket Cause.**

Good cause appearing therefor, it is hereby ordered, that the time within which the plaintiff in error in the above-entitled action may file record and docket cause in the United States Circuit Court of Appeals for the Ninth Circuit be, and the same hereby is extended to and including the 15th day of May, 1917.

Los Angeles, California, March 22, 1917.

TRIPPET,

District Judge.

[Endorsed]: No. 2978. United States Circuit Court of Appeals for the Ninth Circuit. The Sharples Separator Company, Plaintiff in Error, vs. W. W. Skinner, Deft. in Error. Order Extending Time to May 15/17 to File Record. Filed Mar. 26, 1917. F. D. Monckton, Clerk. Re-filed Apr. 30, 1917. F. D. Monckton, Clerk.

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